Supreme Court, U.S.
FILED

No. 03-1457 APR 19 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

CRESCENT WHARF & WAREHOUSE CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT E. BABCOCK
of counsel
WALLACE, KLOR & MANN, P.C.
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-951 ("LHWCA" or "Act") provides compensation for "disability," defined in the Act as the measure of earning capacity lost as a result of work-related physical harm. *Metropolitan Stevedore Company v. Rambo,* 521 U.S. 121, 126-27 (1997). The question presented is:

May an employer subject to the LHWCA be held liable to pay compensation for disability present before and wholly unaffected by employment with that company?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the proceeding resulting in the decision sought to be reviewed are:

Metropolitan Stevedore Company;[1]

Director, Office of Workers' Compensation Programs, United States Department of Labor;

Crescent Wharf & Warehouse Company/Stevedoring Services of America;

Homeport Insurance Company;

Crescent City Marine Ways & Dry Dock Company;

SAIF Corporation;

Pasha Maritime Services; and

State Compensation Insurance Fund.

William Price, the person awarded LHWCA compensation, did not participate in proceedings before the Ninth Circuit.

---

[1] In accordance with Rules 14.1 and 29.6 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
A. The Factor Critical To Proper Application Of The "Last Responsible Employer" Rule Is The Onset Of The Worker's "Disability."	10
B. The Date Of "Disability" Is The Date On Which The Worker's Ability To Earn Is Reduced By The Effects Of Disease Or Trauma, *Not* The Date Of The Final Physical Injury Itself	13
C. The Ninth Circuit's "Bright Line" Rule Of Responsibility Is Inconsistent With The Act's Fundamental Goals	16
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Argonaut Insurance Company v. Patterson, 846 F.2d 715 (11th Cir. 1988) 12

Bath Iron Works Corp. v. Director, OWCP, 244 F.3d 222 (1st Cir. 2001) 11

Cordero v. Triple A Machine Shop, 580 F.2d 1331 (9th Cir. 1978), *cert. den.*, 440 U.S. 911 (1979) 11, 12

Crum v. General Adjustment Bureau, 738 F.2d 474 (D.C. Cir. 1984) 17

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 7, 8, 9, 13, 17

Foundation Constructors v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991) 11

Gardner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1981) 17

Gooden v. Director, OWCP, 135 F.3d 1066 (5th Cir. 1998) 17

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 9

Liberty Mutual Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750 (1st Cir. 1992) 12, 14

Metropolitan Stevedore Company v. Rambo, 521 U.S. 121 (1997) 7, 9

New Haven Terminal Corp. v. Lake, 337 F.3d 261 (2nd Cir. 2003) 11

New Orleans Stevedores v. Ibos, 317 F.3d 480, *cert. den.*, 124 S.Ct. 1038 (2004) 11

TABLE OF AUTHORITIES – Continued

Page

Port of Portland v. Director, OWCP, 932 F.2d 836 (9th Cir. 1991) 12

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 9

State of Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) 9

Traveler's Insurance Co. v. Cardillo, 225 F.2d 137 (2nd Cir. 1954), *cert. den.*, 350 U.S. 913 (1955).... 10, 11, 12

U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982) 9, 18

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 902(2) 14

33 U.S.C. § 902(10) 1, 7, 8, 14

33 U.S.C. § 903(a) 2, 14

33 U.S.C. § 904(a) 2

33 U.S.C. § 906 13

33 U.S.C. § 908 13

33 U.S.C. § 912 13

33 U.S.C. § 913 13

33 U.S.C. § 921(c) 4

OTHER AUTHORITIES:

H.R. Conference Report, No. 98-1027 (1984) 10

PETITION FOR WRIT OF CERTIORARI

Petitioner Metropolitan Stevedore Company respectfully requests this Court to grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decisions of the Benefits Review Board and the Administrative Law Judge were unpublished and are reprinted at App. 10 and App. 23, respectively. The Court of Appeals' decision is reported at 339 F.3d 1102 (9th Cir. 2003) and is reprinted at App. 1. The Court of Appeals' Order denying the Petition for Rehearing and accompanying Suggestion for Rehearing *En Banc* is reprinted at App. 73.

JURISDICTION

The Court of Appeals' decision was filed on August 13, 2003. The Court's Order denying rehearing was dated January 26, 2004. This petition is filed within ninety days of the later date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2(10) of the LHWCA, 33 U.S.C. § 902(10), provides:

§ 902. Definitions

When used in this Act –

> (10) *"Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment*; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in § 910(d)(2) of this title. [*pertinent text italicized*]

Section 3(a) of the LHWCA, 33 U.S.C. § 903(a), provides:

§ 903. Coverage

> (a) Except as otherwise provided in this section, *compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury* occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel). [*pertinent text italicized*]

Section 4(a) of the LHWCA, 33 U.S.C. § 904(a), provides:

§ 904. Liability for compensation

> (a) *Every employer shall be liable for and shall secure the payment to his employees of the*

> *compensation payable under sections 907, 908, and 909 of this title.* In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. [*pertinent text italicized*]

STATEMENT OF THE CASE

This case arises out of claims by longshoreman William Price against a number of waterfront employers alleging that the "cumulative trauma" of maritime employment had resulted in entitlement to compensation under the LHWCA for temporary and permanent disability.

The process leading to the claims had been lengthy. On September 23, 1993, after years of increasing bilateral knee problems, Mr. Price received his physician's recommendation to undergo knee replacement surgeries "when [he] is ready." (App. 26) He ultimately reached the limits of his tolerance for pain and, on December 16, 1994, told his treating physician that he wanted to proceed. (App. 27)

On April 18, 1995, Mr. Price completed all preoperative procedures, signed the necessary formal consents, and was scheduled for surgery on April 24, 1995. On that same date, he received from his physician a form confirming that he would be unable to return to work for six months.

The surgery was performed, as scheduled and in exactly the manner originally recommended, on April 24, 1995. (App. 29) Mr. Price worked for Metropolitan Stevedore Company on only one day, April 22, 1995, four days *after* the surgery was scheduled. (App. 29)

After reviewing the testimony of four physicians, the Administrative Law Judge determined that, although each day of maritime labor performed by Mr. Price "wore off a few more cells of cartilage and a few more cells of bone," the additional microscopic harm occurring during work for Metropolitan did *not* hasten the date of the previously scheduled surgery, lengthen the anticipated six-month period of post-surgical temporary disability, or increase the extent of the ultimate permanent disability. (App. 38; 43-44) Despite these factual determinations, he imposed liability upon Metropolitan. (App. 43-47) The Benefits Review Board affirmed. (App. 21) Metropolitan paid all amounts awarded Mr. Price and appealed.

The single issue presented to the Ninth Circuit on appeal pursuant to 33 U.S.C. § 921(c) was which of the maritime employers against whom the claims had been brought should be held liable to Mr. Price under the so-called "last responsible employer" rule.

To the Ninth Circuit, Metropolitan, joined by the Director, Office of Workers' Compensation Programs, presented a three-step argument. First, they argued that proper application of the "last responsible employer" rule precluded assigning liability to injuries occurring *after* the onset of the worker's "disability." Second, they advocated a definition of "disability" that was focused upon earning capacity, not physical harm. Third, they contended that the onset of Mr. Price's properly defined "disability" predated his work for Metropolitan.

The Ninth Circuit accepted the legal argument that the "onset of disability" was the date critical to proper application of the "last responsible employer" rule and, at least implicitly, agreed that Mr. Price's economic disability predated his work for Metropolitan.

However, the Ninth Circuit determined that it was "unnecessary and undesirable" to apply the statutory definition of "disability" in cases involving cumulative trauma and proceeded to announce a new version of the "last responsible employer" rule, one basing liability upon the date of the final physical "injury" instead of the date of economic disability began.

> "Metropolitan advocates a definition of "disability" under the LHWCA relating to diminished earning capacity, rather than physical harm. Metropolitan urges that because Price was already scheduled for surgery and his employment with Metropolitan did not affect the nature of or need for the surgery, Price's diminished earning capacity was fixed before the date of employment with Metropolitan. Metropolitan therefore argues it was inappropriate for the ALJ to assign liability to Metropolitan as the "last responsible employer."
>
> * * *
>
> In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression of the disease with particular points in time or specific work experiences. However, cumulative traumatic injuries are not necessarily fraught with the same inherent ambiguity and can be correlated more

> directly with identifiable work activities at particular times. *It is unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two-injury cases.*" (339 F.3d, at 1106; App. 8) (emphasis added)

In response to the Department of Labor's request that deference be granted its interpretation of the Act, the Ninth Circuit stated the following:

> "The Director of the OWCP also urges us to use diminished earning capacity as a benchmark. . . . We decline to make this departure from our prior approach; it would introduce new uncertainty into the process of determining liability under the last employer rule. The inquiry would not be a straightforward one: in this case, it might be the date surgery was first recommended, the date that Price finally agreed to surgery, the date the papers were filed, the date the surgery was finally scheduled, or the date Price signed the consent form. In contrast, the approach taken by the ALJ and the Board is easy to apply and reduces uncertainty." (339 F.3d, at 1106-07; App. 8)

The Court offered no explanation for its determinations that the date of "diminished earning capacity" would be more difficult to identify than the date of final microscopic physical harm and that, as between cumulative trauma and disease, the latter is less easily correlated with identifiable work activities.

A Request for Rehearing was filed by Metropolitan. The request was denied and the accompanying Suggestion for Rehearing *En Banc* rejected. (App. 74)

REASONS FOR GRANTING THE PETITION

The LHWCA awards compensation for "disability," *not* physical injury. In cases in which disability is alleged to result from occupational disease or cumulative trauma, all Circuits use a version of the "last responsible employer" rule to identify the employer responsible for the payment of compensation. Until the decision below, all Circuits agreed that the factor critical to imposition of liability was the date on which the worker's ability to earn was reduced by the disease or trauma.

With the comment that it is "unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two-injury cases," the Ninth Circuit decided an important question of federal law in a way that *cannot* be reconciled with the statutory language and scheme, this Court's opinions in *Metropolitan Stevedore Company v. Rambo,* 521 U.S. 121 (1997) and *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469 (1992), or the decisions of all other Circuits that have considered the manner in which the "last responsible employer" rule should be applied.

Section 2(10) of the Act, 33 U.S.C. § 902(10), defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." This statutory definition makes it clear that the "identifying feature" of disability is the *same* "diminished earning capacity" that the Ninth Circuit thought "unnecessary and undesirable" to apply.

In *Metropolitan, supra,* at 126, this Court emphasized both that definition and the distinction between "disability" and "injury."

> "The LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages. . . . The Act speaks of this economic harm as "disability," defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment," § 2(10), 33 U.S.C. § 902(10)."

In *Estate of Cowart, supra,* at 483-84, this Court reminded all Circuit Courts that they lacked the authority to substitute their views of what is necessary and desirable under the statutory scheme for those clearly expressed by Congress.

> "It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts."

When the Ninth Circuit refused to apply Congress' definition of "disability" because it thought that the definition's focus upon diminished earning capacity as the identifying feature was "unnecessary and undesirable," the Ninth Circuit trespassed upon Congress' authority.

These circumstances call for an exercise of this Court's power of supervision and a ruling that, however much it may question Congress' determination of what is appropriate under the LHWCA, the Ninth Circuit must enforce Congress' clearly expressed choices.

The Ninth Circuit's refusal to apply the statutory definition and its rejection of the guidance offered by this Court in *Metropolitan* and *Estate of Cowart* are not the only reasons for review. By imprinting its own unfounded and mistaken perception of what is "necessary and desirable" for those subject to the LHWCA, the Ninth Circuit has created conflict with the other maritime circuits and, with that action, has prevented the uniform application which the LHWCA requires.[1]

In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 616, footnote 10 (1982), this Court stated that

> "Workmen's compensation legislation has never been intended to provide life or disability insurance for covered employees. The required connection between the death or disability and employment distinguishes the workmen's compensation program from such an insurance program . . . "

By severing the required connection between disability and work for the company held liable, the Ninth Circuit has erased that distinguishing feature. Until the decision below is reversed, West Coast members of the nation's maritime community – workers and employers alike – will remain saddled with a misguided rule of responsibility that undermines the Act's fundamental purposes.

---

[1] Indeed, it was this Court's recognition of the need for a nationally uniform maritime compensation system that forced enactment of the LHWCA. See, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); and *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924)

A. The Factor Critical To Proper Application Of The "Last Responsible Employer" Rule Is The Onset Of The Worker's "Disability."

Although many maritime workers are dispatched from union hiring halls on a daily basis and therefore work for many companies during the course of their waterfront careers, the LHWCA includes no mechanism for apportioning liability among employers when disability results from occupational disease or cumulative trauma. Instead, full liability is assigned to one employer in accordance with the so-called "last responsible employer" rule.

The original version of that rule, first proposed by the Department of Labor in an effort to deal with the difficulties in correlating the progression of occupational diseases with specific times and work activities, dates back nearly 50 years to *Traveler's Insurance Co. v. Cardillo,* 225 F.2d 137, 145 (2nd Cir. 1954), *cert. den.*, 350 U.S. 913 (1955).

The *Cardillo* rule was endorsed by Congress at the time of the 1984 amendments to the LHWCA. See, H.R. Conference Report, 98-1027, P.L. 98-426, September 14, 1984. As honed through application in a number of cases, the original "last responsible employer" rule is applied in all circuits in cases of occupational disease.

In all circuits, this version of the rule imposes liability on the employer at the time of the last exposure to substances or conditions that (a) was "injurious," i.e., had the *potential* to cause the disease in question, and (b) predated

the commencement of "disability."[2] For reasons not fully explained in any decisions, some circuits, including the Ninth, apply a modified version of the rule in cases involving cumulative trauma.

Under this – the "two-injury" or "aggravation" – version of the rule, disability that is *wholly* attributable to an earlier maritime injury (or its "natural progression") is the responsibility of the earlier employer. On the other hand, responsibility for disability caused by a combination of the effects of the earlier and subsequent injuries is imposed upon the subsequent employer. See, *Foundation Constructors v. Director, OWCP,* 950 F.2d 621, 623-24 (9th Cir. 1991). See, also, *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 228-29 (1st Cir. 2001) and *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 268 (2nd Cir. 2003).

Despite their differences and until issuance of the decision below, both versions of the rule shared a common, core element. *Both* precluded imposition of liability as a result of work activities performed *after* the "onset of disability."

The rulings requiring that the onset of disability serve as the key factor in assessing liability under the "last responsible employer" rule followed constitutional challenges to the original *Cardillo* standard. The first of these challenges was rejected in *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 1336-37 (9th Cir. 1978), *cert. den.*, 440 U.S. 911 (1979).

---

[2] The most recent confirmation of this rule appears in *New Orleans Stevedores v. Ibos*, 317 F.3d 480, *cert. den.*, 124 S.Ct. 1038 (2004). In *Ibos*, the last alleged exposure to asbestos occurred long *before* the worker's disability and, unlike the situation in this case, at least theoretically *could have* contributed to its onset.

> "Because the onset of disability is a key factor in assessing liability under the last-injurious-exposure rule . . . [W]e conclude that the *Cardillo* rule is sound and does not offend either the due process or the equal protection clauses of the Constitution."

See, also, *Port of Portland v. Director, OWCP,* 932 F.2d 836, 841 (9th Cir. 1991):

> "We reject any reading of *Cardillo* that would impose liability on an employer who *could not,* even theoretically, have contributed to the causation of the disability. Our emphasis on rational connection and causal relation in *Cordero* militates against such a reading."

Both the First and Eleventh Circuit Courts of Appeal have confirmed that proper application of the *Cardillo* rule requires focus on the date of onset of the worker's disability. See, *Argonaut Insurance Company v. Patterson,* 846 F.2d 715, 719 (11th Cir. 1988):

> "[*Cordero*] upheld the rule's constitutionality '[b]ecause the onset of disability is a key factor in assessing liability. . . .' [citation omitted] Today we adopt the *Cordero* rule. . . . "

After a careful review of the legislative history, the First Circuit reached the same conclusion in *Liberty Mutual Insurance Company v. Commercial Union Insurance Co.,* 978 F.2d 750, 755 (1st Cir. 1992):

> " . . . the pronouncements of Congress in 1984 constitute additional support for our conclusion that legislative intent favors a system identifying disability . . . as the critical factor in the assignment of carrier liability under the LHWCA."

Regardless of whether the case involves occupational disease or cumulative trauma, *every* circuit faced with the issue has agreed: *the* factor critical to imposition of liability for LHWCA compensation is the date of "disability."

B. The Date Of "Disability" Is The Date On Which The Worker's Ability To Earn Is Reduced By Disease Or Trauma, *Not* The Date Of The Final Physical Injury Itself.

In the decision below, the Ninth Circuit followed the statutory structure and the path of uniform precedent until the final step. Acknowledging that the "last responsible employer" rule requires a causal link between the compensable disability and the final injury or aggravation, the court phrased the critical question succinctly:

> "The question [is] whether that aggravation was of the "disability," as defined by the Act and interpreted by case law." (339 F.3d, at 1106; App. 6)

Unfortunately, when it answered its own question with the statement that it is "unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two-injury cases" and redefined "disability" as "injury,"[3] the Ninth Circuit committed the error fatal to a proper application of its own rule.

---

[3] The term "disability" appears throughout the Act. Its existence and degree determine when entitlement to compensation begins (§ 906), amounts payable and sources of payment (§ 908), and timeliness of claims (§§ 912, 913). In all of those contexts, all circuits, including the Ninth, have defined "disability" in economic terms. As this Court made abundantly clear in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S.

(Continued on following page)

Under the LHWCA, the identifying feature of "disability" *is* diminished earning capacity. "Disability" is *not* synonymous with "injury."

The LHWCA specifically defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." See, *33 U.S.C. § 902(10).* "Injury" is the physical harm caused by events or conditions at work. See, *33 U.S.C. § 902(2).* "Compensation" is payable under the LHWCA for "disability," *not* "injury." *33 U.S.C. 903(a)* See, again, *Metropolitan, supra,* at 126:

> "The LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages. . . . The Act speaks of this economic harm as "disability."

Until the decision below, no decision from any Circuit had ever equated "disability" with "injury" or used the latter as the key to assigning liability. As noted in *Liberty Mutual, supra,* at 759,

> " . . . diminished earning capacity is the appropriate indicium of disablement and the date on which a worker suffers a diminution in earning capacity is the date of disablement for purposes of assigning carrier liability. The LHWCA unambiguously supports this view, see *33 U.S.C. § 902(10)* (defining disability) [citation omitted], the commentators agree, see, e.g., *Larson, supra,*

469, 479 (1992), a basic canon of statutory construction requires that "identical terms within an Act bear the same meaning."

> § 95.25(a), and the case law elsewhere is in accord. See, e.g., *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073, 111 S.Ct. 798, 112 L.Ed.2d 860 (1991); *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 798-99 (D.C.Cir.1988); *Korineck v. General Dynamics Corp.*, 835 F.2d 42, 43 (2d Cir.1987); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1229 (4th Cir.1985)."

Had the Ninth Circuit applied the statutory definition of "disability" and properly looked to the date on which Mr. Price began to suffer a diminution in earning capacity, Metropolitan could not have been held liable because all disability for which Mr. Price was awarded compensation predated and was unaffected by the microscopic injury during the day's work for Metropolitan.

By redefining "disability" as "injury," the Ninth Circuit transformed the "last *responsible* employer" rule into a "last employer" version that (a) conflicts directly with all other authority, (b) establishes a rule of liability for benefits payable pursuant to the LHWCA devoid of any rational connection between work-related harm and the disability sustained by the worker, and, under the guise of crafting a "bright line" rule of responsibility, (c) threatens the LHWCA's fundamental goals.

C. The Ninth Circuit's "Bright Line" Rule of Responsibility Is Inconsistent With The Act's Fundamental Goals.

The justification offered by the Ninth Circuit for its refusal to apply the statutory definition of "disability" to the process of assigning responsibility for the effects of cumulative trauma was that

> " . . . a bright line rule [based upon final physical harm] eliminates the need for costly litigation and helps ensure that workers receive timely and adequate compensation for their injuries under the LHWCA." (339 F.3d, at 1107; App. 9)

Little could be further from the truth.

Each of the dates posited by the Ninth Circuit as potential indicia of diminished earning capacity was identified in the written medical records and was the subject of only minimal dispute.[4] In contrast, the standard thought by the Ninth Circuit to be "easy to apply" – the date of the final physical harm – required the Administrative Law Judge to determine, after hearing the competing testimony of four physicians, whether microscopic harm to Mr. Price's knees did or did not occur during particular days of work.

To the Ninth Circuit, the "final physical harm" standard may well have appeared simpler. After all, the Administrative Law Judge had already evaluated the conflicting medical evidence. To parties faced with the task of satisfying that standard, however, there is no doubt that it will *substantially* increase both the frequency and costs of litigation.

But increases in litigation and its expenses are not the worst of the results of the Ninth Circuit's approach to the "last responsible employer" issue. The "final physical harm" rule will dramatically delay the delivery of the LHWCA's compensation and medical benefits.

---

[4] The dates mentioned by the Court included the date surgery was first recommended, the date that Price finally agreed to surgery, the date the papers were filed, the date the surgery was finally scheduled, and the date Price signed the consent form. (339 F.3d, at 1107; App. 8)

"Injury" is a broad concept under the LHWCA. At this point, it is well-established that each work-related recurrence of the symptoms of underlying conditions and diseases qualifies as an "injury," even if the underlying conditions themselves are unaffected and even when the recurrence of symptoms is the inevitable result of the combination of the underlying condition and general activity. See, *Crum v. General Adjustment Bureau*, 738 F.2d 474 (D.C. Cir. 1984); *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998); and *Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981).

For as long "injury" continues to encompass the inevitable outcome of activity and its final recurrence at work is permitted to serve as the basis for assigning liability, any employer within the Ninth Circuit asked to voluntarily compensate a disabled worker will be sorely tempted to delay or refuse because, under the rule established in the decision below, all liability will be avoided if the worker continues employment and sustains the inevitable further harm.

As noted by Justice Blackmun in his dissent (joined by Justices Stevens and O'Conner) from the ultimate ruling in *Estate of Cowart, supra,*

> "A fundamental assumption of the Act is that employers liable for benefits will pay compensation "promptly," "directly," and "without an award" having to be issued. * * * [A]llowing employers to escape all LHWCA liability by . . . refusing to pay benefits or acknowledge liability, could hardly be thought consistent with the purpose of encouraging prompt, voluntary payment of LHWCA compensation." (*Cowart, supra,* at 485, 490-91)

CONCLUSION

It is the causal thread between the economic harm for which the LHWCA offers compensation and the work activities performed for the employer held liable that preserves the "last responsible employer" rule from constitutional challenge and, as this Court emphasized in *U.S. Industries/Federal Sheet Metal, supra,* distinguishes workers' compensation from private life and disability insurance.

By declaring it "unnecessary and undesirable" to apply the statutory definition of "disability" in cases involving cumulative trauma, by substituting "injury" for "disability" in its interpretation of the "last responsible employer" rule, and by imposing liability upon an employer who could not have contributed to a worker's disability, the Ninth Circuit has severed that thread.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. BABCOCK
Counsel of Record for Petitioner
WALLACE, KLOR & MANN, P.C.
5800 Meadows Rd., Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949

339 F.3d 1102

United States Court of Appeals,
Ninth Circuit.

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
v.
CRESCENT WHARF AND WAREHOUSE CO.;
Crescent City Marine Ways and Dry Dock
Company; Pasha Maritime Services; Homeport
Insurance Co.; SAIF Corporation;
State Compensation Insurance Fund; William G. Price;
Director, Office of Workers Compensation Programs;
U.S. Department of Labor, Respondents.

No. 01-71505.

Argued and Submitted Feb. 3, 2003.
Filed Aug. 13, 2003.

Robert E. Babcock, Sherwood, OR, for the petitioner.

Gary M. Spero (briefed), State Compensation Insurance Fund, Santa Ana, CA, for respondents Pasha Maritime Services, Marine Terminals Corporation and State Compensation Insurance Fund.

Christopher M. Galichon, Dupree Galichon, plc, San Diego, CA, for respondent Crescent Wharf & Warehouse.

Norman Cole, SAIF Corporation, Salem, OR, for respondents Crescent City Marine Ways & SAIF Corporation.

Whitney R. Given, U.S. Department of Labor, Washington, DC, for respondent Director, Office of Workers' Compensation Programs.

Appeal from the Decision and Order of the Benefits Review Board, United States Department of Labor. BRB Nos. 99-LHC-2826, 99-LHC-2827.

Before KLEINFELD and McKEOWN, Circuit Judges, and SHAPIRO,[1] District Judge.

SHAPIRO, District Judge.

Metropolitan Stevedore Company ("Metropolitan") petitions for review of a Benefits Review Board ("BRB") ruling affirming the decision of the Administrative Law Judge ("ALJ") on a claim filed under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* The ALJ found that Metropolitan was the employer liable for compensation benefits to claimant William Price ("Price") for his disability resulting from cumulative bilateral knee trauma sustained in the course of his longshore employment. The issue on appeal is whether the BRB and ALJ misapplied the Ninth Circuit's "two-injury variant" of the LHWCA's "last responsible employer" rule by imposing responsibility on Metropolitan for the benefits awarded Price.

Facts

Price worked as an industrial mechanic and later as a forklift driver from the mid-1960's until 1996. During that time he worked for several companies for varying periods. Early in his employment he began to experience pain in his knees that increased significantly over time. By 1990,

[1] The Honorable Norma L. Shapiro, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

he tried to obtain work only as a forklift driver and occasionally refused work he believed would aggravate his knee condition. In 1992, he sought medical care for his knee condition; on September 23, 1993, his doctor told him that x-rays revealed medial joint line "collapse" requiring total bilateral knee replacement surgery. Price's last employer before this visit to his doctor was Crescent City Marine Ways ("Crescent City").

In the months following, Price received injections and other prescribed pain medications to avoid or delay the need for surgery. X-rays showed degeneration of the knee condition with no cartilage remaining; Price's knees were described as "bone on bone."

On December 16, 1994, Price asked his doctor to schedule knee replacement surgery. Price's last employer before this visit to his doctor was Crescent Wharf & Warehouse ("Crescent Wharf").

Knee replacement surgery was performed on April 24, 1995. His last day of employment before the surgery was April 22, 1995, when he worked as a forklift operator for appellant, Metropolitan. According to Price, while operating the forklift he had to use the gas and brake pedals and mount and dismount the vehicle many times. He testified that his condition "got progressively worse" over the course of the day. After the surgery, Price filed a LHWCA compensation claim with Metropolitan, his last employer.

Discussion

Under the "last responsible employer rule," a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be

attributable to a series of injuries that the worker suffered while working for more than one employer. *Cordero v. Triple A Machine Shop,* 580 F.2d 1331 (9th Cir.1978), *cert. denied,* 440 U.S. 911, 99 S.Ct. 1223, 59 L.Ed.2d 459 (1979). The claimant's last employer is liable for all compensation due, even though prior employment may have contributed to the disability. *Foundation Constructors v. Director,* 950 F.2d 621, 623 (9th Cir.1991). When determining the employer to be held liable, we apply this rule distinctly depending on whether the disability is an occupational disease, such as asbestosis, or the result of cumulative traumas. *Id.* at 624.

If the disability is an occupational disease, we have held that the responsible employer is the one last exposing the worker to injurious stimuli prior to the date the worker became aware of suffering from the occupational disease. *Stevedoring Services of America v. Director,* 297 F.3d 797, 802 (9th Cir.2002). However, in cases where the disability is a result of cumulative traumas, so-called "two-injury" cases, the responsible employer depends upon the cause of the worker's ultimate disability. If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury *aggravating, accelerating or combining with a prior injury* to create the ultimate disability, we have held that the employer of the worker at the time of the most recent injury is the responsible, and therefore liable, employer. *Foundation Constructors,* 950 F.2d at 624; *Kelaita v. Director,* 799 F.2d 1308 (9th Cir.1986). While it has been suggested that the "last

responsible employer" rule is applied differently depending on whether a disability is categorized as an occupational disease or a two-injury case, we have held that cumulative trauma cases are reasonably analyzed as two-injury cases. *See Kelaita,* 799 F.2d at 1311-12. Here, the parties agree that Price's injury was caused by cumulative trauma. The parties disagree on how the applicable standard should have been applied.

The ALJ weighed all the evidence and determined that injuries suffered during Price's April 22, 1995, employment with Metropolitan caused some minor but permanent increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled. The ALJ relied on doctors' testimony that there was a gradual loss of knee bone and cartilage each additional day Price worked. Since Price was still able to do his job to some extent the day before the surgery, he had not progressed to the point of maximum disability, i.e., total inability to use his legs. There was gradual wearing away of the bone even on the last day before surgery, so his employment with Metropolitan caused a marginal increase in the need for surgery. The ALJ concluded that Metropolitan was the "last responsible employer" and was liable to Price under the LHWCA even though Price had worked for Metropolitan only one day.

The BRB, affirming the ALJ's decision, found that the ALJ provided a rational basis for crediting the opinions of Price's doctors that his condition was aggravated by work for Metropolitan on April 22, his last day of work before surgery. The BRB rejected Metropolitan's contention that the ALJ's findings were not supported by substantial evidence.

The BRB is required to accept the ALJ's findings unless they are contrary to law, irrational, or unsupported by substantial evidence. *Stevedoring,* 297 F.3d at 801. We review the Board's decisions for errors of law and adherence to the substantial evidence standard. *Id.* The BRB's interpretation of the LHWCA is a question of law that we review *de novo. Id.* We will respect the Board's interpretation of the statute where such interpretation is reasonable and reflects the policy underlying the statute. *Id.*

There was substantial evidence allowing the ALJ reasonably to conclude that Price's work for Metropolitan, even on that single day, aggravated his underlying knee condition. Several doctors testified that just because all of the cartilage had already been worn away did not mean there could be no further damage to the knees. The question was whether that aggravation was of the "disability," as defined by the Act and interpreted by case law.

On appeal, Metropolitan argues that the ALJ misapplied the "last responsible employer" rule. Metropolitan advocates a definition of "disability" under the LHWCA relating to diminished earning capacity rather than physical harm. Metropolitan urges that because Price was already scheduled for surgery and his employment with Metropolitan did not affect the nature of or need for the surgery, Price's diminished earning capacity was fixed before the date of employment with Metropolitan. Metropolitan therefore argues it was inappropriate for the ALJ to assign liability to Metropolitan as the "last responsible employer."

Metropolitan's interpretation of the LHWCA and argument regarding diminished earning capacity are not supported by the case law. Our two leading cases, *Foundation*

Constructors v. Director, 950 F.2d 621 (9th Cir.1991), and *Kelaita v. Director,* 799 F.2d 1308 (9th Cir.1986), do not discuss a claimant's earning capacity. In both cases, claimants suffered traumatic injuries that were aggravated while working for other employers to whom liability was assigned. In *Foundation Constructors,* we did not address when the claimant's earning capacity was diminished, but affirmed the ALJ's finding because the work performed for the employer was "harmful" to claimant's condition. *Foundation,* 950 F.2d at 624. Likewise, in *Kelaita,* we based our decision on the finding that "each flare-up of pain represented cumulative trauma and aggravated the underlying injury." *Kelaita,* 799 F.2d at 1311-12.

Metropolitan cites cases from other circuits to support its contention that disability should be defined by diminished earning capacity, but they are inapposite because they are "occupational disease" cases rather than "two-injury" cases. *See Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.,* 978 F.2d 750 (1st Cir.1992); *Argonaut Insurance Co. v. Patterson,* 846 F.2d 715 (11th Cir.1988). The *Liberty Mutual* court specifically stated that its reasoning was limited to occupational disease claims, because occupational diseases, involving continued exposure to injurious stimuli, give rise to "special problems in assigning liability." *Liberty Mutual,* 978 F.2d at 753. The *Argonaut* court also addressed only the occupational disease aspect of the last responsible employer rule. *See* 846 F.2d at 721.

In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression of the

disease with particular points in time or specific work experiences. However, cumulative traumatic injuries are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times. It is unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two-injury cases. This is plainly a two-injury case and substantial evidence in the record supports the ALJ's findings that Metropolitan was Price's last employer and Price's employment with Metropolitan contributed to his injury; the ALJ correctly assigned liability to Metropolitan.

The Director of the OWCP also urges us to use diminished earning capacity as a benchmark, and argues for a rule that assigns liability to the claimant's last employer before the need for surgery arose. We decline to make this departure from our prior approach; it would introduce new uncertainty into the process of determining liability under the last employer rule. The inquiry would not be a straightforward one: in this case, it might be the date surgery was first recommended, the date that Price finally agreed to surgery, the date the papers were filed, the date the surgery was finally scheduled, or the date Price signed the consent form. In contrast, the approach taken by the ALJ and the Board is easy to apply and reduces uncertainty.

The assignment of liability to Metropolitan by the "last responsible employer" rule might seem harsh, because Price had been suffering from a knee condition for years and worked for Metropolitan only one day. However, there is inherent virtue in the "last responsible employer" rule. Each employer subject to the LHWCA shares the risk that it will bear the burden of compensation at one point

or another, even if it was not predominantly responsible for the compensable injury. The unfairness to the last employer is mitigated by two factors: the spreading of the risk through mandatory insurance, and the availability of the second injury fund to the last employer in some cases. As this court stated in *Foundation Constructors,* "this rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time." *Foundation,* 950 F.2d at 623. Having a bright line rule eliminates the need for costly litigation and helps ensure that workers receive timely and adequate compensation for their injuries under the LHWCA.

Conclusion:

The BRB was correct in finding substantial evidence in the record for the ALJ's decision. The BRB was also correct in interpreting the "last employer rule" to impose liability on Metropolitan.

The Decision and Order of the Benefits Review Board is

AFFIRMED.

U.S. Department of Labor
Benefits Review Board
www.dol.gov/brb

BRB No. 00-1017

WILLIAM G. PRICE Claimant v. METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Petitioner CRESCENT WHARF & WAREHOUSE COMPANY/ STEVEDORING SERVICES OF AMERICA and HOMEPORT INSURANCE COMPANY Employer/Carrier-Respondents CRESCENT CITY MARINE WAYS & DRY DOCK COMPANY and SAIF CORPORATION Employer/Carrier-Respondents	DATED ISSUED: *July 16, 2001*

MARINE TERMINALS CORPORATION	)	
and	)	
PASHA MARITIME SERVICES	)	
and	)	
STATE COMPENSATION INSURANCE FUND	)	
Employers/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United Sates [sic] Department of Labor.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for Metropolitan Stevedore Company.

Eric A. Dupree and Christopher M. Galichon (Dupree Galichon & Associates), San Diego, California, for Crescent Wharf & Warehouse Company/Stevedoring Services of America and Homeport Insurance Company.

Norman Cole, Salem, Oregon, for Crescent City Marine Ways & Dry Dock Company and SAIF Corporation.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Metropolitan Stevedore Company (Metropolitan) appeals the Decision and Order Awarding Benefits (99-LHC-2826, 99-LHC-2827) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921 (b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole issue presented by this appeal is whether the administrative law judge erred in finding Metropolitan to be the employer liable for the payment of compensation benefits to claimant for disability resulting from cumulative bilateral knee trauma sustained in the course of claimant's longshore employment. Claimant worked as a mechanic for twenty-one years for Marine Terminals, during which time he began to experience difficulties with his knees. After Marine Terminals closed its San Diego facilities in 1986 or 1987, claimant began to obtain longshore jobs from his union hiring hall's Hold Board. Because some of these jobs exacerbated claimant's knee problems, claimant transferred to the hiring hall's Lift Board in 1990, where he could obtain employment in a less strenuous job as a forklift operator for longshore employers. *See* Tr. at 58-62. Claimant's knee problems continued, however, and were treated by his private health care provider, Kaiser Permanente (Kaiser). *See* Tr. at 62-64;

CXS 4, 5, 6, 7. On September 23, 1993, Kaiser orthopedic surgeon Dr. Simpson, having noted that claimant's x-rays revealed medial joint line collapse and varus alignment, reported that claimant would need a total bilateral knee replacement when he felt ready to undergo such surgery. CX 9. At the recommendation of his physicians at Kaiser, claimant elected to have a series of cortisone injections in an attempt to postpone surgery for as long as possible. *See* Tr. at 64-65; CX 10, 11, 12, 13, 14. Thereafter, claimant's knee pain continued to worsen and claimant advised a Kaiser orthopedic surgeon, Dr. Williams, on December 16, 1994, that he was ready to undergo bilateral knee replacement surgery.[1] *See* Tr. at 67-68; CX 15. Claimant's knee surgery was not scheduled until after his Kaiser physicians ascertained that his cardiac status was stable enough for him to undergo such surgery. *See* Tr. at 69; CX 16. During an April 18, 1995, appointment with Dr. Williams, claimant signed a consent form for a bilateral total knee replacement to be performed on April 24, 1995. During that visit, Dr. Williams conducted a pre-operative physical examination and interpreted x-rays as showing bilateral genu varum, complete loss of medial joint line space with secondary flattening, sclerosis, and other osteoarthritic changes.[2] CX 17. Claimant's last day of employment before his surgery was April 22, 1995, when he worked for Metropolitan as a forklift operator. PAX 7 at 53. In testifying regarding his work duties on April 22, claimant stated that he used gas and brake pedals to operate the forklift and mounted and dismounted the forklift between 6 to 12 times during his eight-hour shift. He further testified, as to his April 22 workday, that his knee condition worsened as the day wore on.[3] *See* Tr. at 73-75; CCMX 2 at 26. On April 24, 1995, Dr. Williams performed bilateral total knee replacement surgery; Dr.

Williams stated that his surgical observations were consistent with the April 18, 1995 x-ray findings. CX 18; PAX 4 at 23-24.

Claimant filed a claim under the Act against Metropolitan for disability due to cumulative trauma to both knees. MSX 1, 2, 3. Subsequently, claimant filed additional claims against Crescent Wharf, Marine Terminals, Pasha Maritime Services (Pasha), and Crescent City Marine Ways (Crescent City).[4] SSAX 6; CCMX 37, 38.

In his Decision and Order Awarding Benefits, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that he suffered a work-related injury while employed by Metropolitan on April 22, 1995, and that Metropolitan rebutted the presumption with the opinion of Dr. London. Decision and Order at 9. Upon consideration of the record as a whole, the administrative law judge concluded that claimant established that he suffered an injury during the course of his employment with Metropolitan on April 22, 1995. Decision and Order at 9-10. The administrative law judge next determined that claimant's employment with Metropolitan on April 22 aggravated his prior knee condition to result in his disability, and, accordingly, found Metropolitan to be the responsible employer. Decision and Order at 10-12. Next, the administrative law judge found that claimant was entitled to temporary total disability benefits from April 24, 1995 through November 5, 1995, 33 U.S.C. §908(b), and to permanent partial disability benefits commencing February 29, 1996, 33 U.S.C. §908(c)(2), (19). Having found Metropolitan entitled to Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability, the administrative law judge ordered Metropolitan to pay claimant

temporary total disability benefits from April 24, 1995 through November 5, 1995, and permanent partial disability benefits commencing February 29, 1996 and for the following 104 weeks, as well as any future injury-related medical expenses. Lastly, the administrative law judge ordered the Special Fund to pay claimant permanent partial disability benefits beginning 104 weeks from February 29, 1996, and for the following 109.12 weeks.

On appeal, Metropolitan challenges the administrative law judge's determination that it is the responsible employer. Crescent Wharf and Crescent City have each filed response briefs, urging affirmance of the administrative law judge's responsible employer determination.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624, 25 BRBS 71, 75(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 950 F.2d 1308, 1311 (9th Cir. 1986); *see also Buchanan v. Int'l Transportation Services*, 33 BRBS 32, 35 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser*

Permanente Hospital, Inc., No. 99-70631 (9th Cir. Feb. 26, 2001); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219-220 (1991). The Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In the instant case, Metropolitan contests its designation as the responsible employer on the basis that there was no causal relationship between claimant's employment with Metropolitan and the resultant disability for which claimant sought compensation.[5] Specifically, Metropolitan argues that it cannot be held responsible for claimant's benefits in the case at bar since any injury occurring during the course of claimant's employment with Metropolitan did not hasten the date of claimant's knee replacement surgery, did not alter the nature of the surgical procedure, did not lengthen the period of post-surgical temporary disability, and did not increase the extent of claimant's permanent partial disability. In their respective response briefs, both Crescent Wharf and Crescent City argue, to the contrary, that the administrative law judge properly found Metropolitan to be the responsible employer on the basis of evidence that claimant's work activities for Metropolitan on April 22, 1995,

caused a permanent increase in the extent of claimant's disability and need for surgery.

Initially, we note that Metropolitan, in order to meet its burden of establishing that it is not the responsible employer, must prove that claimant's disability is due solely to the natural progression of his initial injury. *See Buchanan,* 33 BRBS at 36; *see generally General Ship Service v. Director, OWCP [Barnes],* 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). Thus, if the evidence of record establishes that the injury or aggravation sustained in the course of claimant's work for Metropolitan on April 22, 1995 contributed in some way to claimant's resultant disability, Metropolitan would properly be found to be the responsible employer. *See Foundation Constructors,* 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co.,* 357 F.2d 812.

In the case at bar, the administrative law judge, having weighed the relevant evidence, credited the opinions of Drs. Levine, Greenfield and Williams that each day of work by claimant, including his last day of employment on April 22, 1995, caused some permanent loss of bone and cartilage from claimant's knees, thus increasing claimant's varus deformity, or bowleggedness, and pain. Decision and Order at 9-10. The administrative law judge also considered Dr. London's contrary opinion that claimant's work activities after April 18, 1995, did not increase claimant's pre-surgery impairment, but found it less persuasive than the opinions of the aforementioned physicians. In this regard, the administrative law judge was not persuaded by Dr. London's opinion that the sclerotic condition of claimant's knee bones as of April 18, 1995, would have prevented further bone erosion after that date, as that opinion was contradicted by the testimony of Drs. Williams and Levine

that a depression had been carved into claimant's knee bones by the time of his surgery and that even sclerotic bone can be worn away, increasing varus deformity. *Id.* at 10. The administrative law judge concluded that the preponderance of the evidence establishes that a work-related aggravation of claimant's knee condition on April 22, 1995 contributed to claimant's decreased ability to ambulate and, thus, increased the extent of his disability. *Id.* Moreover, the administrative law judge, having credited the medical testimony of record supporting the conclusion that the progressive loss of bone and cartilage in claimant's knees increased his pain and that the timing of knee replacement surgery is dependent on when the patient is no longer able to tolerate his pain,[6] concluded that the loss of bone that occurred on claimant's last day of work with Metropolitan marginally increased his need for surgery. *Id.*

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP,* 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge provided a rational basis for finding Dr. London's testimony less persuasive than the opinions of Drs. Levine, Greenfield and Williams. The credited opinions of these physicians provide substantial evidence to support the administrative law judge's ultimate determination that the employment-related aggravation suffered by claimant on April 22, 1995, caused some increase, however minor, in the extent of claimant's disability and

need for surgery as of claimant's last date of employment at Metropolitan. *See Buchanan,* 33 BRBS 32. Thus, we reject Metropolitan's argument that neither of the aforementioned factual findings of the administrative law judge is rational or supported by substantial evidence.[7]

We further reject Metropolitan's legal challenge to its designation as the responsible employer, which is premised on its position that it cannot be held liable for compensation since claimant's employment with Metropolitan did not affect his post-surgery disability and claimant had elected to undergo the surgery prior to this job. The administrative law judge found that the weight of the medical evidence supports Metropolitan's assertion that any aggravation that occurred in the course of claimant's April 22, 1995 employment with Metropolitan did not hasten claimant's surgery, lengthen his period of post-surgery temporary disability, or increase the extent of claimant's permanent partial disability. The administrative law judge concluded nonetheless that this finding does not provide a basis for relieving Metropolitan of liability for claimant's compensation. Decision and Order at 11-12. We affirm the administrative law judge's conclusion of law, as it is consistent with the applicable legal principles enunciated by the Ninth Circuit with respect to cumulative traumatic injury cases. The administrative law judge correctly recognized that in cumulative traumatic injury cases, the responsible employer is the employer at the time of the last injury to contribute to the claimant's ultimate disability. *See* Decision and Order at 6-7; *Foundation Constructors,* 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita,* 799 F.2d at 1311. *See also Steed,* 25 BRBS at 219-220. As the aggravation sustained by claimant in the course of his employment with Metropolitan on April 22,

1995, contributed to claimant's disability as of that date, Metropolitan was properly found by the administrative law judge to be the responsible employer. The compensable injury forming the basis of the claim is the last work-related injury to contribute to claimant's disability. *See Steed,* 25 BRBS at 220.

Based on these findings, the administrative law judge properly rejected the notion that the fact that the surgery was scheduled before claimant's April 22 job with Metropolitan meant that this work did not bear a "rational relationship" to claimant's disability. As the administrative law judge found, Metropolitan is assuming that the surgery, rather than claimant's work injuries, caused his disability. In fact, claimant's knee replacement surgery actually reduced the extent of his permanent disability, and the compensable residual disability can only be attributed to the cumulative work injuries. Decision and Order at 11. The administrative law judge correctly noted that had claimant elected to retire on April 24, 1995, instead of undergoing surgery, Metropolitan, as claimant's employer at the time of the last injury to contribute to claimant's disability, would have been liable for claimant's compensation. *See* Decision and Order at 12. We agree with the administrative law judge's analysis and his conclusion that the fact that claimant's disability following the knee replacement was not increased by virtue of the work-related aggravation on April 22, 1995, is not determinative of the responsible employer identification. Whether or not surgery was performed, claimant's disability as of his last day of employment on April 22, 1995, increased as a result of the aggravation to his knee condition that occurred on that date. *See Foundation Constructors,* 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita,* 799

F.2d at 1311. Thus, as the administrative law judge's conclusion that Metropolitan is the responsible employer is supported by substantial evidence and consistent with the applicable law governing the responsible employer determination in cumulative traumatic injury cases, it is affirmed. *Id.*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

---

1) Claimant continued to obtain jobs with various longshore employers through the hiring hall's Lift Board on a regular basis from 1990 up to the date of his knee surgery. *See* Tr. at 65-72. His last employer prior to his December 16, 1994, appointment with Dr. Williams, at which he expressed his desire for surgery, was Crescent Wharf & Warehouse Company (Crescent Wharf), which employed him as a lift truck operator on December 4, 1994. PAX 7 at 58.

2) Claimant's last employer prior to his April 18, 1995 pre-operative examination and consent to surgery was Crescent Wharf, which employed him as a lift truck operator on April 17, 1995. PAX 7 at 53.

3) Claimant also testified, regarding his work in general, that his knees usually hurt more by the end of each work day, and that his knee condition was progressively worsening. *See* Tr. at 73, 77.

4) Following claimant's knee surgery, he was off work until November 8, 1995, when he returned to full-time longshore employment. *See* Tr. at 76; CCMX 1 at 7. He retired from longshore employment in January 1997. *See* CCMX 1 at 11; CCMX 43 at 162.

5) Metropolitan argues, additionally, that the administrative law judge erred in failing to apply the last employer rule applicable to multiple, or cumulative, traumatic injury cases in a manner consistent with the Board's decision in *Kuhnhausen v. Marine Terminals Corp.*, BRB Nos. 99-0782/A (April 20, 2000) (unpublished). Metropolitan's reliance on the unpublished Board decision in *Kuhnhausen* is misplaced, as that case turned on the administrative law judge's weighing of the specific evidence regarding the cause of claimant's disk herniation. Moreover, as the Board regards its unpublished decisions as lacking precedential value, such decisions generally should not be cited or relied upon by parties in presenting their cases. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990).

6) The administrative law judge noted, in this regard, that even Dr. London conceded that pain is the most common indication for knee replacement surgery. Decision and Order at 10.

7) We need not specifically address each of the arguments made in Metropolitan's reply brief regarding the administrative law judge's evaluation of the evidence inasmuch as the Board may neither substitute its views for those of the administrative law judge nor reweigh the evidence. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999). Here, the administrative law judge acted within his prerogative in crediting one witness's testimony over that of another, the administrative law judge drew reasonable inferences from the testimony, and the administrative law judge's findings are supported by substantial evidence. *Id.*

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street – Suite 2100

San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

[SEAL]

In the Matter of

WILLIAM G. PRICE,
Claimant,

v.

METROPOLITAN STEVEDORE CO., CRESCENT WHARF & WAREHOUSE CO., (aka **STEVEDORING SERVICES OF AMERICA**), **MARINE TERMINALS CORP., CRESCENT CITY MARINE WAYS & DRY DOCK CO.,** and **PASHA MARITIME SERVICES,**
Employers,

and

HOMEPORT INSURANCE CO., SAIF CORP., and **STATE COMPENSATION INSURANCE FUND,**
Insurers,

and

DIRECTOR, OWCP,
Party-in-Interest.

June 16, 2000

CASE NO.
1999-LHC-2826
1999-LHC-2827

OWCP NO.
18-60144
18-63849

Irwin Zalkin, Esquire
225 Broadway, Suite 890
San Diego, California 92101
For the Claimant

Christopher M. Galichon, Esquire
Dupree, Galichon & Associates
2040 Harbor Drive, Suite 2
San Diego, California 92101
For Crescent Wharf & Warehouse Co. and Homeport Insurance Co.

Gary Sparo, Esquire
1750 East Fourth Street, Suite 140
Santa Ana, California 92705
For Pasha Maritime Services, Marine Terminals, and State Comp. Ins. Fund

Before: **Paul A. Mapes**
Administrative Law Judge

Robert E. Babcock, Esquire
148 B Avenue
Lake Oswego, Oregon 97034
For Metropolitan Stevedore Co.

Norman Cole, Esquire
SAIF Corporation
400 High Street Southeast
Salem, Oregon 97312
For Crescent City Marine Ways & Dry Dock and SAIF Corp.

John C. Nangle, Esquire
U.S. Department of Labor
350 South Figueroa Street, Suite 370
Los Angeles, California 90071
For the Director, OWCP

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. §901 *et seq.* A trial on the merits of the claim was held in San Diego, California, on March 22, 2000. The claimant and all the above-captioned employers and the insurers were represented by counsel, but no one appeared on behalf of the Director of the Office of Workers' Compensation Programs (hereinafter, "the

Director"). During the trial, the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1-27, Crescent Wharf & Warehouse Co. and Homeport Insurance Company Exhibits (SSAX) 1-12, Crescent City Marine Ways and SAIF Exhibits (CCMX) 1-46, Metropolitan Stevedore Exhibits (MSX) 1-18, and Pasha, Marine Terminals, and State Compensation Insurance Fund Exhibits (PAX) 1-7. All parties except the Director filed post-trial briefs.

BACKGROUND

The claimant, William Price, was born on November 23, 1931, and graduated from high school in 1950, SSAX 9 at 37. In the mid-1960's, he began working as a industrial mechanic for Marine Terminals and during the course of that work would occasionally experience problems with his knees, Tr. at 58, CCMX 43 at 132-33. After Marine Terminals closed its San Diego facilities in 1986 or 1987, he began obtaining jobs from the Hold Board at his union's hiring hall. CCMX 43 at 185-87. However, some of those jobs exacerbated his knee problems, so by 1990 he transferred to the hiring hall's Lift Board which allowed him to obtain jobs as a forklift driver. CCMX 43 at 148-53. After transferring to the Lift Board, the claimant would occasionally turn down certain jobs that he believed would aggravate his knee condition. CCMX 43 at 207-09.

In July of 1992, the claimant was given a comprehensive physical examination by his private health care provider, Kaiser Permanente (hereinafter "Kaiser"), a health maintenance organization, CX 4. In a questionnaire that was part of the exam, the claimant indicated that he experienced pain in his knees and back and wanted those

problems to be specifically addressed. CX 4. On several occasions during the following year, he again sought treatment for knee pain from his primary care physician, Dr. Megorden. CX 6, CX 7, CX 8. On September 23, 1993, the claimant was examined by Dr. R.B. Simpson, an orthopedist, who wrote in his chart notes that x-rays taken that same day had revealed medial joint line "collapse" and varus alignment. CCMX 11. Dr. Simpson also concluded that the claimant "needs TKR-B [total knee replacement-bilateral] when Pt [patient] is ready." CCMX 11, CX 9. According to the claimant, although his Kaiser physicians gave him the option of having such surgery, they also urged him to try injections of pain killers and thereby postpone the surgery until he was 65. Tr. at 64-65, CCMX 43 at 146. The claimant's last employer before the September 23 appointment with Dr. Simpson was Crescent City Marine Ways (hereinafter "Crescent City"), which employed him as a lift truck operator on September 16, 1993. CCMX 2 at 18, CCMX 3 at 35, 36.

In the months following September of 1993, the claimant returned to Kaiser on various occasions to receive injections and other pain medications for his knees. CX 10, CCMX 13, CCMX 14. During one of these visits, he told his physician that he was not yet ready for knee replacement surgery. CX 27 at 18. On June 7, 1994, the claimant received additional injections in his knees and underwent x-rays of both knees. CCMX 15, CCMX 16. On the next day these x-rays were interpreted by a Kaiser radiologist, Dr. Dennis Kaplan, as showing "moderately advanced degenerative changes" with "bilateral medial joint compartment narrowing." CCMX 15. However, according to the testimony of Dr. James London, a board-certified orthopedic surgeon retained by Metropolitan

Stevedore (hereinafter "Metropolitan"), these x-rays actually showed that no articular cartilage remained in the medial compartment of either knee and that the claimant's knees were "bone on bone" MSX 12 at 17, 18, 43, 59, 61. The claimant's last employer before the June 7, 1994 x-rays was Marine Terminals, which had employed him on June 6, 1994 to work as a lift-jitney operator. CCMX 2 at 22, CCMX 3 at 35, 36. In August of 1994, the claimant was given an additional prescription for pain medication and told his physician that he was "thinking about having knees replaced." CCMX 17.

On December 16, 1994, the claimant was seen by Dr. L. Scott Williams, a board-certified orthopedic surgeon employed by Kaiser, CCMX 20. According to the chart notes for that visit, the claimant told Dr. Williams that he had "had enough" and wanted surgical replacement of the knees in both his legs. CCMX 20. According to the claimant, he decided to request the surgery because the injections he had been receiving for his knee pain were only working for a couple of weeks at a time. CCMX 43 at 143. Although the paperwork for the surgery was submitted the same day the claimant saw Dr. Williams, the surgery was delayed for several months because of medical concerns about the claimant's cardiac condition. Tr. at 69. CCMX 43 at 147 (testimony of the claimant), CX 27 at 18 (testimony of Dr. Williams), CX 22 at 78 (report of Dr. Richard Greenfield). According to the claimant, once he decided to have the surgery, he never changed his mind about it. CCMX 43 at 153-54. The claimant's last employer prior to his December 16, 1994 visit to Dr. Williams was Crescent Wharf & Warehouse (hereinafter "Crescent Wharf"), which employed him on December 4, 1994 as a lift truck operator. CCMX 2 at 24, CCMX 3 at 35, 36.

On February 3, 1995, the claimant became concerned that he would be denied a special type of "guaranteed" pay known as "PGP" because of his on-going refusal to accept certain kinds of longshore jobs that he believed to be beyond his physical capacity.[1] Tr. at 72, CCMX 43 at 155-160, 206. Therefore, on February 3, 1995, he left a message with Dr. Megorden's office asking that Dr. Megorden give him a letter verifying that he was medically precluded from performing certain types of jobs. CCMX 21, Tr. at 71-72. This message was then relayed to another Kasier physician, Dr. Bernard Thomas, who on February 6, 1995 sent the claimant a letter in which it was asserted by Dr. Tomas that the claimant was "no longer able to perform his work as a mechanic or longshoreman because of severe arthritis of his knees." SSAX 4. The letter also represented that the claimant was scheduled to undergo surgical replacement of both knees within the next six weeks. *Id.* The claimant testified that he did not want or ask for a letter precluding him from all longshore employment and that he does not recall what he did with the letter after receiving it. CCMX 43 at 199, Tr. at 198-99. In any event, the claimant continued to work as a longshoreman, and, according to payroll records worked 20 days in February, 17 days in March, and eight days during the first three weeks of April, 1995. CCMX 2 at 25-26.

---

[1] A collective bargaining agreement guarantees a certain level of pay to members of the claimant's union even when work is not available. Tr. at 70-72, 191-96. However, this guaranteed pay can apparently be denied to workers who, without a medical excuse, turn down work that they are qualified to perform. *Id.*

As part of the preparation for the knee surgery, on April 18, 1995 the claimant signed a consent form and underwent another series of bilateral knee x-rays, CCMX 27, CCMX 29, Tr. at 196-97. The claimant's last employer before these events was Crescent Wharf, which employed him on April 17 as a lift truck operator, CCMX 2 at 26, CCMX 3 at 35, 36. According to a pre-surgery report prepared by Dr. Williams, these x-rays showed bilateral "genu varum, left greater than right," as well as a "[c]omplete loss of medial joint line space with secondary flattening, sclerosis, and other osteoarthritic changes." CX 17. In a subsequent deposition, Dr. Williams also described these x-rays as indicating that "there was no cartilage left" in the claimant's knees and that when he walked he was rubbing "bare bone on bare bone." CX 27 at 9. Dr. Williams also explained that the term "secondary flattening" means that parts of one of the bones comprising the knee joint has been gradually worn or rubbed away. CX 27 at 12.

The knee replacement surgery was performed by Dr. Williams on April 24, 1995, and, according to the post-operative report was "uneventful." CX 18. According to Dr. Williams, his visual observations during the surgery were entirely consistent with the last pre-surgery x-rays and verified the x-ray indications of eburation, a process he described as "carving a depression in the bone." CX 25 at 24.

The claimant's last day of employment before his knee surgery was April 22, 1995. Tr. at 73-75, CCMX 2 at 26. On that date, he worked for Metropolitan, which hired him to operate a forklift. CCMX 43 at 211-12. According to the claimant, while operating the forklift he had to use gas and brake pedals and during the course of his eight-hour

shift would have probably mounted and dismounted from the vehicle between six and 12 times. Tr. at 74-75, CCMX 43 at 211-12. As the day wore on, he testified, his knee condition "got progressively worse." Tr. at 75. The claimant also testified that by this time his knees were hurting every day and usually hurt more at the end of each day. CCMX 214.

On July 10, 1995, Metropolitan received from the claimant a Longshore Act Form LS-203 claim for benefits.[2] MSX 1, MSX 2, Tr. at 204. The form was dated June 19, 1995 and sought compensation for cumulative trauma to both knees "at various waterfront locations." MSX 2 at 6. The date of injury was represented to be "accumulative to 2/6/95." On the following day, Metropolitan submitted to the Office of Workers' Compensation Programs (OWCP) a First Report of Occupational Illness and a Notice of Controversion. MSX 14, MSX 15. In addition, on August 4, 1995, Antoinette Smith, a senior claims examiner for Metropolitan, sent the claimant's attorney a letter in which she reported that payroll records showed that the claimant had not worked for Metropolitan at any time between February 6, 1994 and February 6, 1995. MSX 4. *See, also*, CCMX 2, CCMX 3 (payroll records verifying that the claimant did not in fact work for Metropolitan during the 52 weeks prior to February 6, 1995).

On October 30, 1995, the claimant's physician authorized him to return to work during the following week. CCMX 33. Accordingly, on November 8, 1995, the claimant

---

[2] A copy of this same form was received by the Office of Workers' Compensation Programs on August 7, 1995. MSX 10.

returned to f full time work as a longshoreman. CCMX 1, CCMX 2, CC MX 43 at 162-63.

On Marc h 21, 1996, Metropolitan received in the mail a copy of a February 29, 1996 report from Dr. Sidney Levine entitled "Qualified Medical Examination." CX 20. The report indicated that the claimant's work injury was "CT" that had occurred in "4/95," that the claimant's employer was Metropolitan Stevedore, and that the claimant had undergone total knee replacement surgery on April 24, 1995. Nothing in the report explicitly indicated that it should be regarded as a claim for Longshore Act benefits and there is no indication that the report was sent to the Office of Workers' Compensation Programs.

On Sept ember 26, 1996, Metropolitan received from the claimant a second Longshore Act form LS-203. MSX 3 at 7. This form also referred to cumulative trauma to the claimant's knees, but unlike the form LS-203 received by Metropolitan in 1995, this form listed the date of injury as "4-22-94" to "4-22-95." At the top of the claim form, someone had written the word "amended." This amended claim was controverted by Metropolitan in a Notice of Controversion dated October 1, 1996. MSX 18.

On Janu uary 1, 1997, the claimant voluntarily retired from longsho ore employment. CCMX 43 at 162-63.

In April of 1998, the claimant filed claims for his knee injuries against Crescent Wharf, Marine Terminals, Pasha, and Crescent City. SSAX 6, CCMX 37, CCMX 38. All of these additional claims were subsequently controverted by the named employers. PAX 5, SSAX 6 at 88, CCMX 40.

ANALYSIS

All parties except the Director have stipulated: (1) that all the claimant's alleged injuries occurred at a maritime situs and while the claimant was employed in a maritime status, and (2) that the claimant's earnings between April 22, 1994 and April 22, 1995 averaged $1,203.59 per week. I find these stipulations to be fully supported by the evidence and hereby adopt them as findings of fact. In addition, all parties except the Director and Metropolitan have stipulated that the claimant was totally temporarily disabled from April 24, 1995 through November 5, 1995.[3]

The following issues are in dispute: (1) the identity of the last responsible employer, (2) the timeliness of the claimant's notice of injury, (3) the timeliness of the claim for benefits, (4) the date of maximum medical improvement, (5) the claimant's average weekly wage, (6) the extent of the claimant's permanent partial disability, (7) the responsible employer's entitlement to Special Fund relief, and, if Metropolitan Stevedore is the responsible employer, (8) the period of the claimant's entitlement to temporary total disability benefits.

---

[3] Metropolitan agrees with this stipulation insofar as it establishes that the period of total temporary disability ended on November 5, 1995, but disagrees with the stipulation insofar as it provides that the period of disability commenced on April 24, 1995. Tr. at 25-29. However, Metropolitan does concede that the claimant was unable to work between April 25 and November 5, 1995. Tr. at 25-28.

1. Identity of the Last Responsible Employer

Under the so-called "last responsible employer rule" a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for more than one employer. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). The rule is designed to avoid the expense and complications that would be inherent in any effort to apportion liability among employers according to their individual contributions to a worker's disability. *Id.* at 1336; *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955). Constitutional challenges to the rule on due process and equal protection grounds were explicitly rejected in the *Cordero* decision, which in effect held that assigning sole responsibility to a single employer is constitutional so long as there is a "rational connection" between the injured worker's employment and the development or aggravation of the worker's disability. *See also Port of Portland v. Director, OWCP*, 932 F.2d 836, 840-41 (9th Cir. 1990) (holding that a "rational connection" is absent when it would be "factually impossible" for a particular employer to have contributed to a worker's disability, but also noting that the *Cordero* decision "does not require a demonstrated medical causal relationship between [a] claimant's exposure and his occupational disease").

When applying the last employer rule, the Ninth Circuit has utilized two distinct tests to determine which of an injured worker's employers will be held liable for all of the worker's disability. The first test applies in cases involving disabilities that are categorized as occupational diseases and the second test applies in cases involving disabilities that are the result of multiple or cumulative

traumas. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991). Under the rule which applies in occupational disease cases, the responsible employer is the employer which last exposed the worker to injurious stimuli prior to the date upon which the worker became aware that he was suffering from an occupational disease arising from his employment.[4] *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 840 (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986). In contrast, under the rule which applies in traumatic injury cases, the identity of the responsible employer depends upon the cause of the worker's ultimate disability. On one hand, if the worker's ultimate disability is the result of the natural progression of a traumatic injury and would have occurred notwithstanding the subsequent injury, the employer that employed the worker on the date of the initial injury is the responsible employer. On the other hand, if the worker's disability is at least partially the result of a new traumatic injury that aggravated, accelerated or combined with a prior injury to create the ultimate disability, the employer that employed the worker at the time of the new injury is the responsible employer. *Foundation Constructors, supra*, at 624.

---

[4] The generally accepted definition of an occupational disease is "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree in comparison with employment generally." *Port of Portland v. Director, OWCP*, 192 F.3d 933, 939 (9th Cir. 1999) (noting, *inter alia*, that walking is not an activity particular to the work of a longshoreman). *See also Goncarcelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2nd Cir. 1989) (citing 1B Larson, *The Law of Workmen's Compensation* §41.00 at 7-353); *Steed v. Container Stevedoring Company*, 25 BRBS 210, 215 n. 2 (1991).

In this case, the claimant's injury was caused by cumulative trauma and thus the responsible employer is the last employer to have subjected the claimant to trauma that combined with, aggravated, or accelerated his pre-existing knee condition.[5] Although the parties apparently agree that this is the appropriate standard, they vigorously disagree on how this standard should be applied to the facts of this case. On one hand, the claimant and all the defendants except Metropolitan contend that Metropolitan was the last employer to have subjected the claimant's knees to cumulative trauma and that it is therefore the last responsible employer. On the other hand, Metropolitan contends that there is neither a factual nor legal basis for finding it to be the last responsible employer.

A. Alleged Lack of a Factual Basis for Finding Metropolitan to be the Responsible Employer

In asserting that there is an inadequate factual basis for finding it to be the last responsible employer, Metropolitan contends that the claimant has failed to make a sufficient showing that he suffered any sort of permanent

[5] It is noted in this regard that although a few state courts have held that cumulative trauma is a type of occupational disease, the Ninth Circuit has a different view. For example, in Foundation Constructors the Ninth Circuit explicitly concluded that a back condition that resulted from repeatedly operating jackhammers and lifting 100-pound weights did not constitute an occupational disease. 950 F.2d at 624. Similarly, in Kelaita the Ninth Circuit upheld the Benefits Review Board's decision that cumulative trauma to a claimant's arm did not amount to an occupational disease. 799 F.2d at 1311-12.

pre-surgery disability as a result of injuries suffered during the course of his employment on April 22, 1995. In contrast, the claimant contends that a clear preponderance of the evidence shows that he was in fact injured during the course of his work for Metropolitan and that the injury did in fact cause a small but permanent increase in the extent of his pre-surgery disability.

Insofar as the claimant contends that he suffered an injury, he is aided by the provisions of subsection 20(a) of the Act, which provides that in proceedings to enforce a claim under the Act, "it shall b presumed, in the absence of substantial evidence to the contrary – (a) that the claim comes within the provisions of the Act. . . . " In order to invoke this presumption, a claimant must produce evidence indicating that he or she suffered some harm or pain *and* that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, a claimant is entitled to invoke the presumption if he or she adduces at least "*some* evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./ Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990) (emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting substantial evidence to counter the presumed relationship between the claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the

presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995). However, the subsection 20(a) presumption does not assist claimants in proving that any disability resulting from a work injury was in fact permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

In contending that he did in fact suffer an increase in his permanent pre-surgery disability as a result of his employment by Metropolitan on April 22, 1995, the claimant relies primarily on the medical opinions of Dr. Levine, Dr. Greenfield, and Dr. Williams. According to Dr. Levine, the claimant sustained additional trauma to his knees every day that he worked, including April 22, 1995. Tr. at 83-85, 119. He further testified that even if all of the cartilage in the claimant's knees had been worn away by June of 1994, the claimant's knee condition would have continued to be aggravated by his work. Tr. at 90. In particular, Dr. Levine opined, after all the cartilage had been lost the bones in the claimant's knees would have started to harden and developed increased spurring. Tr. at 90, 116. As well, he testified, the "varus deformity" that caused the claimant to be "bowlegged" would have continued to progress as the claimant's knee bones gradually wore away in an uneven fashion. Tr. at 90-92. Although Dr. Levine conceded that it would not have been possible at the time of the claimant's surgery to identify any "fresh

erosion or wear" that occurred during the preceding weeks, he also testified that the inability to visually observe such changes doesn't mean that there had been no worsening in the claimant's knee condition. Tr. at 117-18, 129. Rather, he contended, the claimant's knees continued to degenerate until the date of surgery. Tr. at 130. Dr. Levine also testified that the fact that claimant continued to work until a few days prior to his surgery showed that there was still "some life left in his knees." Tr. at 126.

Like Dr. Levine, Dr. Greenfield has also opined that the claimant's work contributed to the deterioration of his knee condition and that the deterioration continued through the claimant's last day of employment. Tr. at 142, 151-52 (testimony), CX 22 at 85 (report indicating that in Dr. Greenfield's opinion the claimant's impairment "is related" to the claimant's last day of employment). In particular, Dr. Greenfield opined, "every single day" the claimant "walked and stood and got up and got down," he permanently "wore off a few more cells of cartilage and a few more cells of bone." Tr. at 142, 173-74. In fact, he testified, if fluids had been withdrawn from the claimant's knee and examined under a microscope, every day there would have been new "cartilage flakes and bone flakes." Tr. at 144-45, 163-64. Dr. Greenfield further testified that in his opinion, the claimant's work activities between April 18, 1995 and his April 24, 1995 surgery "absolutely" contributed to the wearing away of the claimant's knees. Tr. at 151-52.

Although Dr. Williams testified that the deterioration of the claimant's knees would have been "hard to measure," he also in effect agreed with Dr. Levine and Dr. Greenfield insofar as they testified that the deterioration of the claimant's knees was a continuing process that

didn't stop until the claimant underwent his knee replacement surgery. CX 27 at 11-12, 25-26. In addition, Dr. Williams opined that any job that required the claimant to climb up and down from a forklift and push foot pedals would have been a factor in the deterioration of the claimant's knees. *Id.*

The opinions of these physicians are partially corroborated by the claimant, who testified that his knees were "getting worse" as time went along and that "basically" his knees got progressively worse until the day of the surgery. CCMX 43 at 217 (deposition testimony), Tr. at 73 (trial testimony). However, the evidentiary value of these statements is reduced by the fact that the claimant has also testified that it seemed to him that his knee condition "remained the same" between the date he requested the knee surgery and the date of the surgery. CCMX 43 at 197-98.

Metropolitan's contention that the claimant did not suffer a permanent increase in his pre-surgery disability is based primarily on the reports and testimony of Dr. London. According to Dr. London, even though the claimant's work activities between September of 1993 and April 22, 1995 "undoubtedly continued to exacerbate his symptoms," these work activities "did not result in any permanent worsening or aggravation" of the claimant's condition. CCMX 42 at 119, MSX 12 at 16. Dr. London further opined that because the x-rays taken on April 18, 1995 confirmed that all cartilage was gone from the claimant's knees, none of the claimant's activities after April 18, 1995 in any way reduced his ability to work, increased the need for his surgery, or changed the extent of his post-surgery disability. MSX 13 (February 17, 2000 report). In fact, he added, because the claimant's knee

bones had by that time become sclerotic, they were less prone to wear and therefore it is not medically probable that any further bone loss or inflamation occurred following April 18, 1995. *Id.* Dr. London conceded that the claimant's condition could have been worsened by his work activities after September of 1993 if such activities had so severely worn away the bones in his knees that it became necessary to perform surgery of a type different from the surgery originally recommended in 1993, but pointed out that the surgical procedure performed in 1995 was in fact "the exact same procedure" recommended in 1993. CCMX 42 at 119, MSX 12 at 16. In addition, Dr. London testified, even though the claimant's knees were in a "bone on bone' condition by the time he underwent the knee replacement surgery, nothing that occurred after September of 1993 changed the period of recovery or the claimant's ultimate post-surgery impairment. MSX 12 at 18-28. Dr. London also asserted that because the claimant's knee replacement surgery "was already recommended" in September of 1993, the claimant's subsequent work activities "did not worsen his underlying condition" and could not have hastened the need for that surgery, which Dr. London characterized as "inevitable." CCMX 42 at 119-20 (report of June 7, 1999).

After considering the foregoing evidence, I find that the opinions of Dr. Levine, Dr. Greenfield and Dr. Williams are sufficient to warrant invocation of the subsection 20(a) presumption that the claimant suffered a work-related injury while employed by Metropolitan on April 22, 1995. I further find that the testimony of Dr. London constitutes substantial evidence and is therefore sufficient to rebut that presumption. It is thus necessary to consider all of the relevant evidence to determine if the claimant

has shown by a preponderance of the evidence that he did in fact suffer an injury during the course of his work on April 22, 1995 and that the disability resulting from any such injury was permanent. After so considering the evidence, I conclude that the claimant has in fact shown by a preponderance of the evidence that injuries suffered during his April 22, 1995 employment by Metropolitan did in fact cause some minor but permanent increase in the extent of his disability and increase the need for his knee surgery. There are two reasons for this conclusion.

First, despite Dr. London's assertion that the claimant's work activities following April 18, 1995 did not result in any permanent increase in the claimant's pre-surgery knee impairment or reduce his ability to work, Dr. Levine, Dr. Greenfield, and Dr. Williams have provided persuasive reasons for concluding that on each additional day the claimant worked there was a gradual, albeit barely perceptible permanent loss of bone and cartilage from the claimant's knees which caused the claimant to become progressively more bowlegged. Dr. London's suggestion that the onset of sclerosis in the claimant's knee bones would have prevented such further bone erosion after April 18, 1995 is unconvincing because it is inconsistent with the testimony of Dr. Williams indicating that by the time of the claimant's surgery a "depression" had been carved into the bones in the claimant's knees and with Dr. Levine's testimony that even sclerotic bone can gradually be worn away and cause a patient to become more bowlegged. CX 27 at 13, 23-24 (testimony of Dr. Williams), Tr. at 90-91 (testimony of Dr. Levine). It is further noted that although knee replacement surgery was medically justified well before April of 1995, the claimant was nonetheless able to perform his usual longshore job only two days

before the surgery and testified that he would have continued performing such work for at least a month even if the surgery had been postponed. It is thus obvious that on April 22, 1995 the claimant's knee condition had not yet progressed to the point of maximum disability, i.e, to a point where the claimant had a total inability to use his legs. It is therefore reasonable to conclude that even after the claimant's surgery had been scheduled, additional work-related aggravations of his knee condition were still gradually decreasing his ability to ambulate and thereby still permanently increasing the extent of his disability.

Second, even though the claimant had been in need of surgery even before his last day of work, the wearing away of bone that occurred on that last day still marginally increased the need for such surgery. Although Dr. London has disputed this conclusion and asserted that the claimant's post-1993 longshore work did not increase the need for the knee replacement surgery, that assertion is unpersuasive because it is inconsistent with the fact that other medical experts have credibly testified that the claimant's work probably increased his knee pain and that the timing of knee replacement surgery primarily depends upon how long the patient is able to tolerate his or her knee pain. CX 27 at 9, 12-13 (testimony of Dr. Williams that any increase in the wearing away of bone and cartilage increases the extent of a patient's problems, including pain), Tr. at 104 (testimony of Dr. Levine that the timing of knee replacement surgery depends on when the patient is no longer able to tolerate his or her knee pain), Tr. at 138 (testimony of Dr. Greenfield that he tells his patients to have knee replacement surgery when "you can't take any more"). Indeed, even Dr. London has conceded that "pain is the

most common indication for surgery" and that "more pain" is "a greater indication" for surgery. MSX 12 at 43.

B. Alleged Lack of a Legal Basis for Finding Metropolitan to be the Responsible Employer

Metropolitan also argues that even if the work the claimant performed while employed by Metropolitan on April 22, 1995 did in fact cause some permanent increase in his pre-surgery disability or increase the need for his surgery, it still could not possibly be the last responsible employer because the claimant's knee replacement surgery had been planned several months earlier and any injury that might have occurred during the course of the claimant's April 22, 1995 employment did not cause the surgery to occur any sooner, lengthen the post-surgery period of temporary disability, or increase the extent of permanent disability following from the surgery. Indeed, Metropolitan contends that any decision holding an employer liable in such circumstances would violate the employer's Fifth Amendment rights to due process and equal protection of the law. Metropolitan also asserts that its position is supported by language in a series of Ninth Circuit decisions including the *Cordero* decision, the 1990 *Port of Portland* decision, and the recently issued (but unpublished) decision in *Maersk Stevedoring Company v. Container Stevedoring Company* (Case No. 98-70852, January 11, 2000).

I find that the weight of the medical evidence clearly supports Metropolitan's assertion that any injury that might have occurred during the course of the claimant's April 22, 1995 employment did not cause his knee replacement surgery to occur any sooner, lengthen the post-surgery period of temporary disability, or increase the

extent of the claimant's permanent disability. However, this finding does not provide sufficient legal grounds for assigning last responsible employer liability to some other employer. There are several reasons for this conclusion.

First, because the weight of the evidence shows that during the course of the claimant's employment by Metropolitan on April 22, 1995 he suffered injuries that permanently increased his pre-surgery disability and increased the need for his previously scheduled surgery, there is no constitutional impediment to finding that Metropolitan is the last responsible employer. Although the knee surgery was scheduled well before the April 22 employment, this fact alone does not logically establish that there was no "rational relationship" between this employment and the claimant's pre-surgery disability. Nor does the fact that the surgery had been previously scheduled necessarily mean that there was no rational relationship between the claimant's April 22, 1995 employment by Metropolitan and his post-surgery disability. Metropolitan's error in arguing otherwise is due to its implicit assumption that it is the surgery that caused the claimant's permanent disability, not the claimant's work injuries. This assumption is incorrect. The surgery actually reduced the extent of the claimant's permanent disability and thus the remaining disability can only be attributed to the work injuries. There is, moreover, no way of apportioning responsibility for the post-surgery disability among the employers who contributed to the pre-surgery disability which could not be assailed as being even more arbitrary than the last

employer rule.[6] In short, a finding that the last of these employers is responsible for the entire residual disability would not be so irrational that it violated that employer's constitutional rights. It should also be noted that if the claimant had elected to retire on April 24, 1995 instead of undergoing the knee replacement surgery, the responsible employer would have clearly been the employer last associated with an injury causing a permanent increase in the extent of the claimant's disability. Allowing the claimant's personal decision to undergo the surgery to interfere with that result would itself be arguably irrational.

Second, Metropolitan is on unsound ground insofar as it argues that proper application of the last responsible employer rule requires that liability for the claimant's disability be assigned to the employer at the time of the last injury before surgery was medically justified rather than to the employer for whom the claimant worked at the time of the last injury to have permanently aggravated his pre-surgery disability. This assertion has previously been considered and rejected by the Benefits Review Board. *See Abbott v. Dillingham Marine and Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd sub nom. Williamette Iron and Steel Co. v. OWCP*, 698 F.2d 1235 (9th Cir. 1982).

Third, although there is a recent unpublished Ninth Circuit decision holding that an employer can escape liability by submitting affirmative factual proof that a

---

[6] Although it could be argued that "credit" for the improvements achieved by the surgery should be given to the most recent employers like Metropolitan (i.e., last in-first out), it could just as logically be argued that credit for the improvements should be given to the earliest potentially responsible employers (i.e., first in-first out).

claimant's disability did not worsen during the period of the claimant's employment (*Maersk Stevedoring*) and an earlier decision holding that an employer can avoid liability by showing that it could not have even theoretically contributed to a worker's disability (i.e., the 1990 *Port of Portland* decision holding that an employer that had not employed a claimant until *after* he had undergone a determinative audiogram could not logically be the last responsible employer), both of those decisions involved occupational injuries (noise related hearing losses), not traumatic injuries like the knee injuries at issue in this case.[7] More importantly, in this case Metropolitan has failed to produce any convincing affirmative factual proof of the type that was found to be determinative in the *Maersk Stevedoring* decision and has also been unable to demonstrate any sort of logical impossibility such as was shown in the 1990 *Port of Portland* case.

Finally, it is noted that Metropolitan is mistaken in suggesting that the claimant's early awareness of the onset of his disability in some way excludes Metropolitan from consideration as the last responsible employer. Although determinations concerning a claimant's awareness of onset of disability are important in determining the identity of the last responsible employer in cases involving occupational injuries, awareness of disability is

---

[7] Moreover, the unpublished decision in *Maersk Stevedoring* may conflict with the published decision in *Lustig v. U.S. Department of Labor*, 881 F.2d 593 (9th Cir. 1989), which held in effect that the last responsible employer rule could be used to hold an employer liable even in a case where a disabled worker's exposure to a harmful substance (asbestos) by the employer was so recent that such exposure could not have medically had any role in causing the worker's disability.

not a relevant inquiry in determining the last responsible employer in traumatic injury cases like this one. *See,* e.g., *Kelaita, supra,* at 1311. *See also Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219-20 (1991). Moreover, even in occupational disease cases a worker's early awareness of a work-related disability does not relieve subsequent employers from liability if during the course of working for those employers the worker suffered injuries that permanently increased the extent of his or her pre-existing disability.

2. Timeliness of Notice of Injury

Subsection 12(a) of the Act provides, *inter alia*, that a claimant must give an employer notice of a compensable work-related injury within 30 days of the injury or within 30 days after the employee is aware of a relationship between the injury and the employment unless the claimant's injury is an "occupational disease which does not immediately result in disability or death," in which case notice must be given within one year after the claimant becomes aware of the relationship between the employment, the disease, and the death or disability. However, subsection 12(d)(2) provides that failure to give timely notice shall not be a bar to the recovery of benefits if the responsible employer or carrier was not prejudiced by the claimant's failure to provide notice in a timely fashion. Moreover, there is a presumption that the employer was not prejudiced by lack of timely notice which, under the provisions of subsection 20(b) of the Act, can be overcome only if the employer produces substantial evidence to the contrary. *See Kashuba v. Legion Insurance Co.*, 139 F.3d 1273, 1275 (9th Cir. 1998); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 240 (1990).

In this case, Metropolitan asserts that it was in fact prejudiced by the five-month delay in receiving notice of the cumulative injuries alleged in the initial July 1995 claim and by 16-month delay in receiving notice of the April 22, 1995 injury. Metropolitan thus contends that the claimant's request for compensation is barred under the provisions of section 12. The claimant, however, contends that even if he did fail to provide timely notice to Metropolitan, his claim is still valid because the company was not prejudiced as a result of the delay.

Although subsection 12(d) does not specify the type of showing that a defendant must make in order to establish that it was prejudiced by a failure to receive timely notice, helpful guidance can be found in the Ninth Circuit's *Kashuba* decision. In that decision, the court noted that three purposes are served by the notice requirement: "effective investigations, providing effective medical services, and preventing fraudulent claims." 139 F.3d at 1276. Thus, the court held that in the Ninth Circuit evidence "that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services" is sufficient to meet the employer's burden.[8] 139 F.3d at 1276. However, the court also pointed

---

[8] *See also* 7 A. Larson, *Larson's Workers' Compensation Law* §78.32 at 15-194 to 15-205 (1999) (observing that proof of lack of prejudice usually follows the pattern set by the two objectives of the notice statute: first a showing that the claimant's injury was not aggravated by reason of the employer's inability to provide early diagnosis and treatment; and second, a showing that the employer was not hampered in making its investigation and preparing its case).

out that mere conclusory allegations of prejudice are not sufficient. *Id. See, also ITO Corporation v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989) (holding that generalized assertions that an employer was prejudiced because it had no opportunity to investigate a claim when it was fresh are not sufficient to show prejudice).

Metropolitan's argument that it was prejudiced by the claimant's failure to provide timely notice of his work-related injury is based entirely on the testimony of Ms. Smith, who as previously noted, is a senior claims examiner for Metropolitan. According to her testimony, if she had been given a request for medical treatment from Kaiser prior to the claimant's April 24, 1995 surgery, she would have first reviewed the "causation" question to determine the identity of the responsible employer, taken the claimant's statement to find out if anything "specifically happened" on the last day of employment by Metropolitan, obtained a "medical consultation to determine the extent of disability" and had them [medical consultants] "compare diagnostic tests to find out whether we are, in fact, the last responsible employer," Tr. at 207-08. When asked to explain her reference to "diagnostic tests" she indicated that she was referring to certain tests described earlier in the trial by Dr. Greenfield, who opined that it could be possible to determine if a claimant had suffered recent knee damage by conducting a microscopic examination of the fluids in the claimant's knee at the time of his surgery. Tr. At 208 (testimony of Ms. Smith), Tr. at 144-45, 163-64 (testimony of Dr. Greenfield). In addition, Ms. Smith testified, if she had known before April 22, 1995 that the claimant had been scheduled for knee replacement surgery she would have taken steps to ensure that

the claimant not be allowed to work for Metropolitan. Tr. at 208-10.

For the following reasons, I find that even if the foregoing testimony could be viewed as substantial enough to rebut the subsection 20(a) presumption that sufficient notice has been provided, on balance the preponderance of the evidence shows that Metropolitan was not in fact prejudiced by the claimant's failure to provide the 30-day notice specified in subsection 12(a).

First, although there are apparently no published decisions on this issue, logic suggests that when a worker has sustained a series of traumatic injuries which have each caused at least some increase in the extent of the worker's permanent disability, the 30-day notice period does not expire until 30 days after the last injury in the series. Thus, in this case, the subsection 12(a) notice period would not have expired until May 22, 1995, by which time it would have been too late for Metropolitan to have either barred the claimant from re-employment or taken pre-surgery fluid samples from his knees.

Second, Metropolitan's assertion that the claimant's failure to provide timely notice of his injury prevented it from having him barred from further employment and from collecting fluid samples from his knees appears to be based on a clearly erroneous assumption about when the notice should have been filed, i.e., on an assumption that the claimant had an obligation to have filed a notice of injury within 30 days after the "cumulative to 2/6/95" date of injury alleged his initial claim. In fact, no such obligation existed because the claimant did not work for Metropolitan at any relevant time prior to February 18, 1995. *See*, e.g., CX 1 (payroll records affirmatively showing that

the claimant was not employed by Metropolitan at any time between January 6, 1990 and February 18, 1995). Hence, the earliest conceivable date of *any* injury arising out of employment at Metropolitan is February 18, 1995.

Third, even if February 18, 1995 could be used as the date of injury for section 12 purposes, it is unlikely that a timely notice of injury would have actually resulted in either a pre-surgery ban on the claimant's re-employment or an attempt to analyze the fluids in his knees. In this regard, it is noted that if notice of an injury had been given to Metropolitan within 30 days of February 18, 1995, (i.e., by March 20, 1995), in all likelihood Metropolitan would still have not had enough information to have motivated it to ban the claimant from re-employment or to try to obtain fluid samples from his knees. Rather, the necessary information would have probably not been known to Metropolitan until it had first obtained and reviewed the claimant's medical records. Before this could have occurred the medical records would have had to have been requested by Metropolitan, copied by Kaiser, and then sent to Metropolitan. It seems unlikely that all of these actions could have occurred within the four week period between March 20 and April 22, 1995. Indeed, the evidence indicates that Metropolitan's investigation of the medical history of persons filing new Longshore Act claims is considerably slower. For example, the trial testimony indicates that Metropolitan did not make any attempt to depose the claimant, obtain copies of his Kaiser records, or have him examined by a physician until almost one year after receiving the claimant's amended claim in July of 1996. Tr. at 224-26. Although it has been suggested that this year-long delay in obtaining the relevant information was due to the fact that Metropolitan knew that the

claimant's surgery had already occurred, this explanation does not apply to Metropolitan's failure to promptly request the claimant's medical records after the initial claim was filed in July of 1995. Nothing in that claim indicates that surgery had already been performed and Ms. Smith has acknowledged that, in fact, it was not until July of 1996 that she first learned of the claimant's surgery. Tr. at 207.

Fourth, although it is theoretically possible for an employer to show that an injured worker's failure to provide timely notice denied the employer an opportunity to provide medical care that could have achieved a better result than was achieved in the absence of proper notice, there is no such evidence in this case. In fact, all of the medical experts agree that the claimant needed knee replacement surgery and none of these experts has in any way suggested that the medical care the claimant received from Kaiser was in any way inferior to the medical treatment that he could have received elsewhere. Indeed, as explained *infra*, the knee replacements provided by Kaiser achieved results that are about as good as can be expected from any knee replacement surgery.

Fifth, in contrast to the situation described in the *Kashuba* decision, there is no evidence in this case that in any way suggests that a timely notice of injury could have somehow helped Metropolitan rebut a potentially fraudulent claim. For example, in this case, unlike the *Kashuba* case, there is no reason to suspect that the claimant's injury was not work-related or to doubt the claimant's representations concerning any other aspects of his claim.

Finally, although Ms. Smith's testimony accurately indicates that neither the claimant nor Kaiser sought

Metropolitan's advance authorization for the April 24, 1995 surgery, Metropolitan is mistaken insofar as it may be assuming that the failure to make such a request somehow provides a valid basis for rejecting the claimant's request for disability compensation. Even though subsection 7(d) of the Longshore Act does indicate that an injured worker should make an advance request for medical treatment, the Act's only sanction for failing to make such a request is a provision that sometimes precludes the worker from obtaining reimbursement for the costs of such treatment.[9] Likewise, although subsection 7(d)(2) of the Act requires medical care providers to submit a claim for the costs of the treatment of an injured worker within 10 days after the treatment is first provided, nothing in the Act in any way suggests that a failure to submit such a claim by the tenth day provides a basis for denying wage-loss compensation to the injured worker.

3. Timeliness of the Claim for Benefits

As previously explained, the claimant was not in fact employed by Metropolitan at any time in the one-year preceding the date of injury alleged in his first claim ("accumulative to 2/6/95") and the claimant's September 1996 "amended" claim against Metropolitan was not filed until well over a year after the claimant's April 22, 1995 work injury. Accordingly, Metropolitan argues that any claim against it is now barred by subsection 13(a) of the

[9] In this regard, it is noted that in this case the claimant is not seeking and cannot be granted a Longshore Act award for the cost of his surgery or for any of the other treatment provided by Kaiser. Tr. at 11-13; *Nooner v. National Steel and Shipbuilding Co.*, 19 BRBS 43 (1986).

Act, which explicitly provides that all claims for work-related traumatic injuries must be filed within one year after the injury. In response, the claimant contends, *inter alia*, that his claim is not barred because his September 1996 "amended" claim constituted a permissible amendment to the claim sent to Metropolitan in July of 1995.

There are apparently no decisions under the Longshore Act which specifically resolve the question of whether it is permissible after the relevant limitations period has run for a claimant to amend a timely but otherwise meritless claim to correct an incorrect "date of injury." However, the leading treatise on workers' compensation law indicates that, as a general rule in workers' compensation cases, "considerable liberality is usually shown in allowing amendment of pleadings to correct such defects as vagueness, omission of essential facts, or inaccuracy in the description of the injury" so long as the amendment does not result in "undue surprise or prejudice to the opposing party." 7A. Larson, *Larson's Workers' Compensation Law* § 77A.43 at 15-38 to 15-44 (1999) (footnotes omitted). A earlier version of this passage was cited with apparent approval by the Supreme Court in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7 (1982). Moreover, the Supreme Court's concurrence with Larson's observation was in turn cited by the Benefits Review Board in its holding in *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), that because an Administrative Law Judge's had determined that there was no prejudice to the defendants, it was permissible, even after the expiration of the statutory limitations period, to allow a timely Longshore Act claim to be amended to state an entirely new theory of recovery and thereby impose liability on an insurer that would have

otherwise not been the responsible insurer.[10] Similar decisions have even been issued in cases governed by the Federal Rules of Civil Procedure. *See Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 361-62 (9th Cir. 1966) (holding that even though the limitations period had run, it was permissible for plaintiffs seeking payment of unpaid wages to amend their otherwise timely complaint to include a demand for an additional category of wages). Accordingly, I conclude that the claimant's September 1996 (amended) claim should be regarded as a permissible amendment to his initial claim unless Metropolitan can show that it has been "unduly" surprised or prejudiced by the amendment. In this regard, it is noted that although Metropolitan has asserted that it has been prejudiced by the claimant's failure to provide timely notice of his injury, it has not alleged that any additional or greater prejudice resulted from the September 1996 amendment to the initial claim. Nor is there any evidence in the record that would suggest that any such prejudice has occurred. Likewise, there is no reason to believe that the amended claim was an undue, last minute surprise that somehow handicapped the presentation of Metropolitan's case. indeed, the amended claim was provided to Metropolitan more than three years prior to the trial of this case. I therefore find that the amendment to the initial claim was permissible and that

---

[10] Other holdings in *Mikell* decision were reconsidered but not altered by the BRB in a subsequent decision. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32 (1992), aff'd mem. 14 F.3d 58 (11th Cir. 1994).

the amended claim is not barred under the provisions of section 13.[11]

4. Date of Maximum Medical Improvement

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent

[11] In view of this finding, it is unnecessary to consider the claimant's contention that Dr. Levine's report of February 29, 1996 constituted a timely claim or the contention that the limitations period was tolled under the provisions of subsections 30(f) of the Act.

as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

In this case, the claimant contends that his condition did not reach the point of maximum medical improvement until February 29, 1996. His primary support for this contention is the February 29, 1996 report in which Dr. Levine opined that the claimant's condition had become permanent and stationary. CCMX 34 at 85. In contrast, Metropolitan asserts that the claimant's condition became permanent and stationary on October 30, 1995. Metropolitan's position is based on a form signed on October 30, 1995 in which Dr. Williams indicated that the claimant could return to work without restrictions on November 6, 1995. CCMX 33.

Review of the relevant medical evidence indicates that although Dr. Williams did opine on October 30, 1995 that the claimant could return to work in November of 1995, Dr. Williams did not expressly conclude that the claimant's condition had become permanent and stationary. Thus, it is at least conceivable that Dr. Williams believed that the claimant had not yet achieved a full recovery from his surgery, but could nonetheless return to work without endangering the recovery process. Moreover, although Dr. Levine did not examine the claimant until almost ten months after the claimant's surgery, Dr. Levine is first physician to have explicitly found that the claimant's condition had in fact reached the point of maximum medical improvement. I therefore conclude that the date of

maximum medical improvement is the date chosen by Dr. Levine: February 29, 1996

5. Average Weekly Wage

The claimant contends that his average weekly wage at the time of his April 22, 1995 injury was $1,203.59 and that he is therefore entitled to benefits at the maximum compensation rate of $760.92 per week. Tr. at 14-15. Metropolitan has stipulated that the claimant had average weekly earnings of $1,203.59 in the 52 weeks prior to April 22, 1995, but contends that by the end of that period the claimant had no actual earning capacity. Tr. at 15-16. Thus, Metropolitan contends, the claimant's average weekly wage at the time of his injury was zero.

Under the provisions of section 10 of the Act, an injured worker's average weekly wage should ordinarily be based on the worker's average earnings in the 52 weeks preceding his or her injury. However, exceptions to this general rule are permitted in certain special circumstances, such as when the earnings in the year prior to the worker's injury were artificially reduced by a temporary illness or when there has been significant and permanent increase in the worker's wage earning capacity during the 52 weeks preceding the worker's injury. *Le v. Sioux City and New Orleans Terminal Corp.*, 18 BRBS 175, 177 (1986); *Klubniken v. Crescent Wharf and Warehouse Co.*, 16 BRBS 182 (1984). *See also Bonner v. National Steel and Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979); *Palacios v. Campbell Industries*, 633 F.2d 840, 843 (9th Cir. 1980) (holding that where an injured worker had begun working as a painter shortly before his work-related injury, an administrative

law judge was required to reflect in the claimant's average weekly wage calculation such amounts as the claimant might have earned following his injury in his new occupation as a painter).

I find that in this case Metropolitan has failed to provide any convincing reasons for departing from the general rule requiring average weekly wage determinations to be based on the injured worker's earnings in the 52 weeks prior to injury. There are two grounds for this conclusion. First, although Dr. Thomas did opine in February of 1995 that the claimant was unable to work as a longshoreman, there has been no showing that Dr. Thomas had any idea of the physical demands of the claimant's usual job as a forklift driver. Second, the evidence shows that even though there was ample medical justification for the claimant's April 25, 1995 knee surgery, until the day of that surgery the claimant was nonetheless capable of performing his regular job without making any sort of extraordinary effort or receiving any special treatment from his employers.[12] Indeed, the claimant credibly testified that even if the surgery had been

[12] In this regard it is noted that there is insufficient evidence to support a conclusion that the claimant's earning capacity materially declined in the final months preceding his surgery. Rather, payroll records indicate that the claimant worked 20 days in February, 17 days in March, and eight days during the first three weeks of April, 1995. CCMX 2 at 25-26. Although the claimant did testify that he had been avoiding some jobs before his knee surgery, the evidence indicates that this avoidance of onerous jobs had been occurring for several years. CCMX 43 at 134, 150, 203-04, 207-08 (claimant's testimony that he began limiting his work activities in the early 1990s). Hence, the claimant's earnings in the 52 weeks prior to April 22, 1995 already reflect his avoidance of jobs that were beyond his capacity.

delayed for another month, he still would have continued working. CCMX 43 at 203. *See also Fox v. West State, Inc.*, 31 BRBS 118 (1997). Accordingly, I find that the claimant's benefits should be based on his average weekly wage during the 52 weeks prior to April 22, 1995 – $1,203.59.

6. Extent of Permanent Partial Disability

Under the provisions of subsections 8(c)(4) and 8(c)(19) of the Act, a worker who suffers the permanent partial loss of use of a leg is entitled to that portion of 288 weeks compensation which is equal to the percentage of the use of the worker's leg that has been lost, even if there is no proof of an actual loss of wage earning capacity. *See Henry v. George Hyman Construction Co.*, 749 F.2d 65 (D.C. Cir. 1984). Conversely, the amount of an injured worker's benefits is limited to the amount specified in subsection 8(c) and may not be increased to reflect additional losses, such as pain or suffering. *Young v. Todd Pacific Shipyards Corporation*, 17 BRBS 201 (1985). Pain may be relevant, however, in determining the extent to which a claimant has lost the use of a particular body part. *See Amato v. Pittson Stevedoring Corp.*, 6 BRBS 537 (1977). In determining the extent of loss of use of a body part, an administrative law judge may rely on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereinafter the "AMA Guides"), but is not required to use those guidelines, except in cases involving hearing losses under subjection 8(c)(13) and occupational diseases covered under the provisions of subsection 8(c)(23). *Ortega v. Bethlehem Steel Corporation*, 7 BRBS 639 (1978). Payment of scheduled disability awards should ordinarily commence on the date the claimant's condition reaches the point of maximum

medical improvement. *Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 235 (1985).

In this case, the claimant asserts that he has permanently lost 50 percent of the use of each of his legs due to his knee injuries. In contrast, Metropolitan contends that the claimant has lost only 30 percent of the use of each leg. Both of the physicians who have provided opinions concerning the extent of the claimant's permanent disability have based their opinions on the Fourth Edition of the AMA Guides. Under these Guides, there are three possible ratings for patients who have undergone total knee replacement surgery. AMA Guides at 3/85, Table 64. If the results of the surgery are characterized as "good," Table 64 of the Guides specifies a 37 percent lower extremity impairment. If the results are only "fair" there is a 50 percent lower extremity impairment, and if the results are "poor" the lower extremity impairment is 75 percent. Table 66 of the Guides sets forth a point-based scale for determining whether the results of the surgery were "good," "fair," or "poor." Points are assigned for the following factors: Pain, Range of Motion, Stability, Flexion Contracture, Extension Lag, and Alignment. AMA Guides 3/88 at Table 66. When a total of 85 to 100 points are assigned, the surgery results are considered "good," whereas the results are considered "fair" when 50 to 84 points are assigned. AMA Guides 3/85 at Table 64. When fewer than 50 points are assigned, the results are rated as "poor." *Id.*

The claimant's contention that he has suffered a 50 percent loss of use of each leg is based on the opinion of Dr. Levine. According to Dr. Levine, the results of the claimant's knee surgeries were only "fair" and therefore under the AMA Guides he has suffered a 50 percent loss of use of each of his lower extremities. CCMX 35, Tr. at 92,

97-99, 123-25. Although Dr. Levine's reports and trial testimony do not specifically address every one of the factors contained in Table 66, Dr. Levine's trial testimony does indicate that he assigned only 20 out of a possible 50 points in the Pain category, only 10 out of a possible 25 points for the Stability (laxity) category, and only 20 out of a possible 25 points for the Range of Motion factor. Tr. at 97-99.

Metropolitan's contention that the claimant has suffered only a 30 percent loss of use of his legs is based on the testimony and report of Dr. Greenfield, Tr. at 19-21. According to Dr. Greenfield, his application of the rating factors in Table 66 to the claimant's knees indicated that 45 out of a possible 50 points should be assigned in the Pain category, 25 out of a possible 25 points should be assigned in the Stability category, and 24 out of a possible 25 points should be assigned in the Range of Motion category thereby producing a total of 94 points. Tr. at 164. Therefore, he testified, under Table 64 the results of the surgeries were "good" and the claimant has suffered no more than a 37 percent loss of use of each lower extremity. *Id.*, CX 22. Although Dr. Greenfield did not testify that these 37 percent ratings should each be reduced to 30 percent under the AMA Guides Combined Values Table, Metropolitan apparently argues that such a reduction is nonetheless required.

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special

weight."[13] *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, in this case, neither Dr. Williams nor any other treating physician has provided a rating. Although the claimant has suggested that Dr. Levine should be regarded as a treating physician, none of Dr. Levine's reports in any way indicates that he has in fact been treating the claimant. Instead, these reports indicate that Dr. Levine has been merely an examining physician who was retained solely for purposes of litigation.[14] *See* CX 20, CX 21, CX 25. Hence, neither Dr. Greenfield's rating nor Dr. Levine's rating is entitled to any "special weight."

In evaluating the foregoing ratings, I note initially that Dr. Levine has apparently assigned too few points for the Range of Motion factor. In particular, although Table 66 specifies that one Range-of-Motion point should be

---

[13] However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if contradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the ALJ's decision sets forth "specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Id.*

[14] For this reason, Dr. Levine's charges are recoverable as litigation expenses under section 28 of the Act, but not as medical expenses under section 7 of the Act.

assigned for each five degrees of range of motion and Dr. Levine measured the claimant's range of motion as being 125 degrees in each knee, he assigned only 20 out of a possible 25 points in the Range of Motion category. *See* CCMX 34 (Dr. Levine's February 29, 1996 report indicating that he measured a 125 degree range of motion in each of the claimant's knees). Likewise, Dr. Levine's low (10-point) rating for Stability is inconsistent with the passage in Dr. Levine's February 29, 1996 report describing the claimant's knees as "stable." CCMX 34 at 9. Finally, I also conclude that Dr. Levine's 20 point Pain rating is less consistent with the claimant's descriptions of his post-surgery knee pain than Dr. Greenfield's 45 point pain rating.[15] *See* CCMX 34 at 78, 85-86 (report of Dr. Levine indicating that the claimant described occasional "slight" left and right knee pain that progresses to "moderate" pain when engaging in activities such a squatting), CX 22 at 84 (report of Dr. Greenfield indicating that the claimant had "minimal intermittent pain in both knees, becoming slight intermittent pain with prolonged kneeling or attempts to crawl"), Tr. at 76-77 (claimant's testimony that climbing does not "bother" his knees "too much"), CCMX 43 at 174-75 (claimant's testimony that he can go up and down stairs and has no problems stepping off curbs). Accordingly, I find that Dr. Greenfield's 37 percent bilateral disability rating is more convincing than Dr. Levine's 50 percent bilateral rating. However, I disagree with the

[15] It is noted in this regard that Table 66 indicates that 45 points should be assigned if a patient experiences only "mild or occasional" pain and that 40 points should be assigned if there is pain only on stairs. If a patient experiences pain both when climbing stairs and walking, 30 points are to be assigned.

contention that the Combined Values Chart in the AMA Guides requires each of the 37 percent ratings to be reduced to 30 percent. Although the Chart does indicate that two 37 percent impairments are equivalent to a 60 percent "whole person" impairment, there is nothing in the Combined Values Chart or the AMA Guides that in any way suggests that this or any other "whole person" rating should be divided to reduce the original ratings that were combined by the chart. Indeed, even though it makes sense to make some reductions in individual impairment ratings when calculating a "whole person" rating, it is completely illogical to reduce the impairment rating for one limb simply because there is also an impairment of another limb. *See also* TR. at 94 (testimony of Dr. Levine that a "whole person" impairment should not be divided in half to determine the extent of the impairment in each leg).

Accordingly, I find that the claimant is entitled to receive 106.56 weeks of benefits for his right leg impairment and an additional 106.56 weeks of benefits for his left leg impairment. Pursuant to the provisions of subsection 8(c)(22), the foregoing benefits must be paid consecutively, rather than concurrently. Such payments first became due on the date the claimant's condition became permanent and stationary; February 29, 1996.

7. Entitlement to Special Fund Relief

Metropolitan seeks Special Fund relief from any award of permanent disability benefits. In order to obtain relief from the Special Fund under subsection 8(f) of the Act an employer must show: (1) that a claimant had a permanent partial disability prior to his or her work-related injury, (2) that the pre-existing disability was

manifest prior to that injury, and (3) that the pre-existing disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982).

Although the Director was not represented at the trial, on March 1, 2000 the Director's counsel did submit a pre-trial statement in which he conceded that Metropolitan's application for Special Fund relief was timely and that it met the first two requirements for such relief. However, the statement indicated, the Director does not "approve" of an award of subsection 8(f) relief, apparently because the contribution and responsible employer issues remained unresolved at the time Metropolitan's application was filed. Since the responsible employer issue has been resolved, the only remaining issue is whether the claimant's pre-existing disability contributed to his ultimate permanent disability in the manner required under subsection 8(f).

It is well established that there are two aspects to the contribution requirement. First, the employer must establish that the claimant's ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is either partial or total. 20 C.F.R. § 702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, subsection 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. *FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2nd Cir. 1992); *Two "R" Drilling Co. v.*

Director, OWCP 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. § 702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185 (4th Cir. 1993). In this case it is absolutely clear from the medical evidence that neither the claimant's left nor right knee disabilities are due solely to his April 22, 1995 injury. As well, it is also absolutely clear that the claimant's pre-existing left and right knee disabilities caused the April 22, 1995 injury to result in materially and substantially greater disabilities. Accordingly, I conclude that the evidence is sufficient to show that all three of the subsection 8(f) contribution requirements have been fully satisfied for the disability in each of the claimant's knees.

In cases where a claimant has multiple or successive disabilities, the extent of an employer's entitlement to subsection 8(f) relief depends upon the number of separate injuries suffered by the claimant. For example, in *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), the Benefits Review Board (BRB) held that when a single injury results in successive periods of permanent disability, an employer who has established entitlement to subsection 8(f) relief is

required to pay only 104 weeks of permanent disability benefits.[16] In contrast, however, the BRB has also held that when multiple disabilities arise from completely separate injuries, an employer who is otherwise entitled to subsection 8(f) relief is not relieved of liability after paying only 104 weeks of permanent disability benefits and must instead pay the amounts specified in subsection 8(f) for each separate injury before the Special Fund assumes any liability. *Cooper v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 284 (1986). This distinction has been explicitly affirmed by at least one appellate court. *Newport News Shipbuilding and Dry Dock Company v. Howard*, 904 F.2d 206 (4th Cir. 1990).

In this case, Metropolitan alleges that its liability for benefits should be limited to 104 weeks, but neither Metropolitan nor the Director has submitted any argument on the question of whether the claimant's knee impairments are the result of a single injury or multiple injuries. Moreover, there are apparently no reported decisions by the Benefits Review Board determining whether there has been more than one injury when impairments to two separate body parts simultaneously result from the same work related activity.[17] However, the

---

[16] *See also Henry v. George Hyman Construction Co.*, 21 BRBS 329 (1988), and *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988) (holding that where there are successive awards for permanent disability and death, an employer who is entitled to subsection 8(f) relief must pay only 104 weeks of benefits if both awards arise from the same injury).

[17] It is noted in this regard that the Benefits Review Board has recently issued a decision holding that when there has been a single injury which has caused a worker to become entitled to concurrently receive benefits for both a scheduled disability and an unscheduled

(Continued on following page)

Fourth Circuit's *Howard* decision does indicate that in the opinion of the Fourth Circuit multiple impairments which simultaneously result from the same cause should be attributed to a single injury. *See* 904 F.2d 211 (statement observing that if the back injury and carpal tunnel syndrome that had disabled the claimant in that case had occurred "simultaneously," the claimant's employer would have been liable for only 104 weeks of permanent disability benefits). In this case, the claimant's knee impairments indisputably occurred simultaneously and as the result of the same work activity. Accordingly, I find that the claimant's knee impairments are due to a single injury and therefore further conclude that Metropolitan should not be required to pay more than 104 weeks of permanent partial disability benefits.[18]

---

disability, an employer seeking subsection 8(f) relief must establish all of the elements of entitlement to such relief for each separate disability. *See Padilla v. San Pedro Boat Works*, ___BRBS___(May 17, 2000, BRB No. 99-862) slip opinion at 7-10. Such entitlement was not established by the employer in that case and therefore the BRB's decision did not indicate whether the successful establishment of all of the elements of entitlement for both types of disabilities would have limited the employer's liability to only one 104 week period. However, in other cases where the BRB has required employers to show entitlement to subsection 8(f) relief for each type of benefit awarded (e.g., in cases involving claims for both permanent disability and death benefits), the Board has nonetheless held that an employer is liable for only one 104-week period if the entitlement to the different types of benefits "arose from the same injury." *See Fineman v. Newport News Shipbuilding and Dry Dock Co.*, 27 BRBS 104, 109-10 (1993); *Henry v. George Hyman Construction Co.*, 21 BRBS 329, 331 (1988).

[18] In this regard it is noted that subsection 2(2) of the Longshore Act defines the term "injury" to be an "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or *as*

(Continued on following page)

8. Period of Total Temporary Disability

It is clear from the medical evidence that as a result of the claimant's knee surgery, he was totally temporarily disabled from at least the date of the surgery (April 24, 1995) until November 5, 1995. Metropolitan does not dispute the November 5, 1995 termination date, but has declined to join in a stipulation that the period of temporary total disability commenced on the date of the claimant's April 24, 1995 surgery. Instead, Metropolitan apparently argues that the claimant's total temporary disability commenced at some earlier date. I find this argument to be contrary to the weight of the evidence. Accordingly, I find that the claimant was totally temporarily disabled from April 24, 1995 through November 5, 1995.

ORDER

1. Metropolitan shall pay the claimant compensation for temporary total disability for the period between April 24, 1995 and November 5, 1995, inclusive, at a compensation rate of $760.92.

---

naturally or unavoidably results from such accidental injury. . . . " (emphasis added). I interpret this language to mean that even if a worker suffers impairments in more than one body part, the impairments are still the result of a single injury if the impairments directly or indirectly resulted from a single "accidental injury" or "occupational disease." Thus, for example, if an accidental injury to *one* of a worker's ankles indirectly caused impairments in *both* of the worker's legs, there would still be only one injury because both impairments "naturally or unavoidably" resulted from a single accident.

2. Beginning on February 29, 1996 and for the following 104 weeks, Metropolitan shall pay the claimant permanent partial disability benefits for the partial loss of use of his legs at a compensation rate of $760.92 per week.

3. Beginning 104 weeks from February 29, 1996 and for the next 109.12 weeks, the Special Fund shall pay the claimant permanent partial disability benefits at a compensation rate of $760.92 per week.

4. Metropolitan shall provide the claimant all medical care that may in the future be reasonable and necessary for the treatment of his knee injuries.

5. Metropolitan and the Special Fund shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. § 1961.

6. The District Director shall make all calculations necessary to carry out this order.

7. Within 30 days after this Decision and Order *becomes final*, counsel for the claimant shall submit a fully supported *and updated* application for costs and fees to the undersigned administrative law judge and to counsel for Metropolitan. Within 15 days thereafter, counsel for Metropolitan shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with counsel for Metropolitan. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the

agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Metropolitan. Counsel for Metropolitan shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by this administrative law judge.

Paul A. Mapes
Administrative Law Judge

Date

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

METROPOLITAN STEVEDORE COMPANY, Petitioner, v. CRESENT [sic] WHARF AND WAREHOUSE CO.; et al., Respondents.	No. 01-71505 BRB Nos. 99-LHC-2826 99-LHC-2827 District of Oregon, Portland ORDER (Filed Jan. 26, 2004)

Before: KLEINFELD, McKEOWN, and SHAPIRO,* Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Kleinfeld and McKeown have voted to deny the petition for rehearing en banc, and Judge Shapiro has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

---

* The Honorable Norma L. Shapiro, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(3)

Supreme Court, U.S.
FILED
MAY 11 2004
OFFICE OF THE CLERK

No. 03-1457

In The

Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

CRESCENT WHARF & WAREHOUSE COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER M. GALICHON
LAW OFFICE OF
CHRISTOPHER M. GALICHON
1650 Hotel Circle No.,
Suite 120
San Diego, CA 92108
619-260-4950

Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Can a Longshore employer avoid liability for disability even when the employment caused a permanent worsening and hastened the need for treatment?

CORPORATE DISCLOSURE STATEMENT

In accordance with Rules 14.1 and 29.6 of this Court, Crescent Wharf & Warehouse Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*	1
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	9
Metropolitan's Date Of Onset Test Is Not Appropriate For Scheduled Injuries	11
Disability For Unscheduled Injuries Is Both A Physical And Economic Test	13
THE OCCUPATIONAL DISEASE TEST IS NOT APPLICABLE TO ORTHOPEDIC INJURIES	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Bath Iron Works Corp. v. Director, 506 U.S. 153, 113 S.Ct. 692 (1993) ..... *passim*

Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291, 115 S.Ct. 2144 (1995) ..... *passim*

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 117 S.Ct. 1953 (1997) 1, 10, 14, 15, 16

STATUTES

33 U.S.C. § 902(2) 2

33 U.S.C. § 902(10) 2, 10

33 U.S.C. § 908(c)(1-22) 3, 8, 10, 12, 13

33 U.S.C. § 908(h) 5, 13, 14

33 U.S.C. § 910(i) 6, 12

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*

Respondent Crescent Wharf & Warehouse agrees that this Court should review the judgment of the United States Court of Appeals for the Ninth Circuit. Although the Ninth Circuit reached the correct result in this case, it was reached for the wrong reasons, and the decision by the Ninth Circuit is in direct contradiction to the previous decisions of the United States Supreme Court.

This Court has held that the Longshore Act provides compensation for disability, which has an economic as well as a medical component. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 115 S.Ct. 2144 (1995). Disability is defined by the Longshore Act as incapacity, because of injury, to earn wages which the Employee was receiving at the time of injury in the same or other employment. For certain scheduled injures, the statute creates a conclusive presumption of incapacity to earn wages. This case is such a scheduled injury resulting from cumulative occupational trauma.

This Court has applied this definition of disability in the occupational trauma setting before. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692 (1993). In *Bath*, the Supreme Court found that cases of occupational trauma such as hearing loss, where symptoms present simultaneously with the occurrence of trauma, are subject to the conclusive presumption of incapacity to earn wages. The Supreme Court then utilized the holding and analysis from *Bath* in its subsequent decision of *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291, 115 S.Ct. 2144 (1995); *Metropolitan*

Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 117 S.Ct. 1953 (1997).

The United States Court of Appeals for the Ninth Circuit, in this case, found that the scheduled injuries to Longshoreman Price were the responsibility of Metropolitan Stevedore Company, the employer at the time of the last injury. In so doing, however, the Ninth Circuit applied a definition of disability which focuses entirely on the physical injury and ignores the economic component of disability. This diversion from prior holdings of this Court should not be allowed to stand. As this Court has always found, disability must be both economic and physical in order to result in an award of compensation. The last employer to cause injury which contributes to that disability, both physically and economically, is responsible for payment of compensation. In this case, that employer is Metropolitan Stevedore Company.

RELEVANT STATUTORY PROVISIONS

Section 2(2) of the LHWCA, 33 U.S.C. § 902(2), provides:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

Section 2(10) of the LHWCA, 33 U.S.C. § 902(10), provides:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

Section 8(c) of the LHWCA, 33 U.S.C. § 908(c), provides:

> Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee, as follows:
>
> (1) Arm lost, three hundred and twelve weeks' compensation.
>
> (2) Leg lost, two hundred and eighty-eight weeks' compensation.
>
> (3) Hand lost, two hundred and forty-four weeks' compensation.
>
> (4) Foot lost, two hundred and five weeks' compensation.
>
> (5) Eye lost, one hundred and sixty weeks' compensation.
>
> (6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: (A) Compensation for loss of hearing, of one ear, fifty-two weeks. (B) Compensation for loss of hearing of both ears, two hundred weeks. (C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (I) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced. (D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

* * *

(21) Other cases: In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In any case in which there shall be a loss of, or loss of use of more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

Section 8(h) of the LHWCA, 33 U.S.C. § 908(h), provides:

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision

> (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

Section 10(i) of the LHWCA, 33 U.S.C. § 910(i), provides:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

STATEMENT OF THE CASE

Longshoreman William Price claimed to have suffered cumulative trauma to his knees, which continued to get progressively worse with each day of work, up to and including his last day of employment at Metropolitan

Stevedore Company. Price asserted that Metropolitan Stevedore Company was responsible for his injuries and brought a claim pursuant to the Longshore Act against Metropolitan Stevedore Company. In turn, Metropolitan alleged that although Claimant indeed did suffer cumulative trauma to his knees through his last day of employment, that some trauma other than that which occurred at Metropolitan Stevedore Company was wholly responsible for Claimant's disability.

Price had been receiving treatment for his longstanding knee problems for years prior to his last day of work. Although surgery had been recommended, Price continued working over a year and a half until ultimately having surgery. Price suffered increasing pain with work activities up through his last day of employment at Metropolitan Stevedore Company after which he finally obtained the recommended surgical procedure.

At trial, evidence was presented to the Administrative Law Judge from Claimant's treating surgeon, who testified that Claimant's condition continued to deteriorate with ongoing activities up to and including his last day of employment. Two other testifying orthopedic surgeons supported the testimony of Dr. Williams that the final trauma occurred during work at Metropolitan.

After hearing the evidence, the Administrative Law Judge credited the opinions of the three testifying orthopedic surgeons and found that the deterioration was a continuous process which did not stop until after the actual surgery took place. The work aggravations continued to decrease Claimant's ability to be ambulatory, caused more pain, and increased the need for surgery. The Administrative Law Judge found that Metropolitan Stevedore Company permanently increased Claimant's pre-injury disability, and hastened

the need for surgery, and that Claimant was entitled to compensation pursuant to Sections 908(c)(4) and 908(c)(19) of the Longshore Act.

The Benefits Review Board affirmed the ALJ, ruling that the Findings of Fact and Conclusions of Law by the Administrative Law Judge were rational, supported by the substantial evidence and in accordance with the law. The Benefits Review Board also affirmed the Administrative Law Judge's decision that Metropolitan was the responsible employer.

The Ninth Circuit affirmed the holding of the Administrative Law Judge and the Benefits Review Board. In so doing, the Ninth Circuit correctly found that Metropolitan was the last employer to contribute to Price's disability. The Ninth Circuit found there was substantial evidence to support the findings of the Administrative Law Judge.

> "The ALJ weighed all the evidence and determined that injury suffered during Price's April 22, 1995 employment with Metropolitan caused some minor, but permanent, increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled. The ALJ relied on doctors' testimony that there was a gradual loss of knee bone and cartilage each day Price worked. Since Price was still able to do his job to some extent the day before surgery, he had not progressed to the point of maximum disability, i.e., total inability to use his legs. There was a gradual wearing away of the bone, even on the last day before surgery, so his employment with Metropolitan caused a marginal increase in the need for surgery."

The Ninth Circuit, however, inexplicably departs from the well-settled definitions of disability and proceeds to articulate a new test for determining disability and causation.

> "In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression of the disease with the particular points in time or specific work experiences. However, cumulative trauma injuries are not necessarily fraught with the same inherent ambiguity, and can be correlated more directly with identifiable work activities at particular times. *It is unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two injury cases.*" (Emphasis added).

The Ninth Circuit did not address why it departed from the previously well-settled law that disability has both physical and economic elements, other than to say that the contentions asserted by Metropolitan and the Director of the OWCP were not in accordance with the law.

A request for rehearing was denied by the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

Respondents Crescent Wharf & Warehouse agree with the Ninth Circuit that the ultimate result should be that Metropolitan is found liable. Such a finding is consistent with this Court's pronouncements regarding disability being both a physical and economic concept. All circuits

have, in turn, adopted some version of this holding to identify the last employer in situations of cumulative trauma. Unfortunately, when the Ninth Circuit departs from this definition, the decision also departs from the statutory language of the Longshore Act, and this Court's decisions in both *Bath Iron Works Co. v. Director, OWCP* and *Metropolitan Stevedore Co. v. Rambo (Rambo I and Rambo II)*.

Section 902(10) of the Longshore Act defines disability as: "The incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." The statutory definition, by its very terms, requires both injury and an incapacity to earn wages. In *Rambo*, this Court emphasized the appropriate definition for disability.

> "The LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages. The Act speaks of this economic harm as disability, defined as the capacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10)."

Such incapacity is conclusively presumed for certain enumerated or scheduled injuries, which are compensated at two-thirds the worker's pre-injury wages over specified periods of time. See 33 U.S.C. § 908(c)(1-20); § 908(c)(22). For other so-called unscheduled injuries resulting in less than total disability, the Act sets compensation at 66 2/3 percent of the difference between the average weekly pre-injury wages of the employee and the employee's wage-earning capacity thereafter. 33 U.S.C. § 908(c)(21).

In *Bath Iron Works*, the Court found cases of occupational trauma were not subject to the occupational disease test, but instead were subject to the test articulated in *Rambo*. At the time the Court was specifically discussing hearing loss.

> "The injury, loss of hearing, occurred simultaneously with the exposure to excessive noise. Moreover, the injury is complete when the exposure ceases. Under those circumstances, we think it quite proper to say that the date of last exposure – the date upon which the injury is complete – is the relevant time of injury. . . ."

The Ninth Circuit's definition of disability cannot be squared with the Supreme Court's pronouncements on the same issue. The Ninth Circuit has created its own definition of disability, which, in turn, conflicts with other circuits and with the Supreme Court. For this reason, until the decision is reversed, the definition of disability under the Longshore Act in the Ninth Circuit will be inconsistent with the statute, the circuits interpreting that statute, and the United States Supreme Court.

Metropolitan's Date Of Onset Test Is Not Appropriate For Scheduled Injuries

Metropolitan suggests a date of onset test because the LHWCA purportedly includes no mechanism for apportioning liability among employers in cases of cumulative trauma. Metropolitan seeks to have the Court find that the date of onset of disability is not equated with the final assault on the body, but instead occurs sometime prior to that point.

The Supreme Court has previously addressed the issue of occupational or cumulative trauma in *Bath Iron Works v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692.

Initially, the *Bath Iron Works* Court found that compensation for permanent partial disability was determined in one of two ways. If the injury was of a kind specifically identified in the schedule set forth in § 908(c)(1-20) of the Act, the injured employee was entitled to two-thirds of his average weekly wage at the time of the injury for a specific number of weeks, regardless of whether his earning capacity had actually been impaired.[1] In all other cases, the Act authorized compensation equal to two-thirds of the difference between the employee's average weekly wage and his post-injury earning capacity. 33 U.S.C. § 908(c)(21). In those cases, unlike the scheduled injury cases in which the disability was presumed, it was necessary for the employee to prove that his injury had actually decreased his earning capacity.

The Court noted that Congress then added a third method addressing "claims for death or disability due to an occupational disease which does not immediately result in death or disability." 33 U.S.C. § 910(i). The time of injury was defined as the date on which the employee or claimant becomes aware, or " . . . should have been aware of the relationship between the employment, the disease, and the death or disability." The Director in *Bath Iron Works* argued that work-related hearing loss, unlike a

[1] Although the Court in that case was addressing loss of hearing, injuries to the legs are a specifically enumerated disability. 33 U.S.C. § 908(c)(2).

disease such as asbestosis, caused immediate disability. This Court found that occupational hearing loss does result in immediate disability because the injury occurs simultaneous with the exposure to excessive noise and is complete when the exposure ceases. This is consistent with cumulative trauma injuries, which are complete when the claimant stops working. Since the injury is complete with the last assault, in cases where economic loss is presumed because of an enumerated disability, the employer at the time of the last assault becomes the last employer to affect disability, and thus, the responsible employer.

Disability For Unscheduled Injuries Is Both A Physical And Economic Test

The Supreme Court on multiple occasions has articulated that in cases of injuries covered under Section 908(c)(21) of the Act, the compensation for injury resulting in less than total disability is calculated by determining the difference between the average weekly wage, pre-injury, and the employee's wage-earning capacity after injury. The Court in *Rambo* goes on to articulate that Section 908(h) of the Act defines wage-earning capacity.

> "Wage-earning capacity is to be determined by his actual earnings if such earnings fairly and reasonably represent his wage-earning capacity; provided, however, that if the employee has no actual earnings, or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Deputy Commissioner may, in the interest of justice, fix such wage-earning capacity shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other

> factors or circumstances indicates which may affect his capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend into the future." 33 U.S.C. § 908(h).

By its very terms, the Act defines wage-earning capacity, an element of disability, as including in and of itself a requirement that the trier of fact give due regard to the nature of injury and the degree of physical impairment.[2]

Metropolitan and the Ninth Circuit both make similar mistakes in their argument. Metropolitan seeks to eliminate the physical aspect of disability and focus only on the economic diminution of earnings. The Ninth Circuit seeks to eliminate the economic aspect of the definition of earnings and focus solely on the physical aspects of disability. Both points of view, when discussing unscheduled injuries, are incorrect. This Court in *Rambo I, Rambo II* and *Bath Iron Works* has articulated that the standard includes two prongs, one prong which focuses on the diminution of earnings, and the other prong which focuses on both environmental and physical factors, including the resultant physical impairment which resulted from the injury itself.

---

[2] In *Metropolitan v. Rambo*, Metropolitan sought to argue that the concept of disability should focus on only the economics of whether claimant's actual earnings show economic disability. The Supreme Court was not persuaded by that argument and, instead, found disability to include the concept of wage-earning capacity, which, by definition, includes the necessity to consider the physical harm of injury as an element of disability. Thus, Metropolitan seeks to posit the same core argument which has previously been rejected by this Court.

The language of the Supreme Court in *Rambo I, Rambo II* and *Bath Iron Works* is clear and unequivocal, that in cases of unscheduled disability, there is a two-prong test which must be applied without exception. That standard should be upheld by the Supreme Court here.

THE OCCUPATIONAL DISEASE TEST IS NOT APPLICABLE TO ORTHOPEDIC INJURIES

The Director, OWCP, essentially suggests that a version of the occupational disease rule would be the appropriate test. The Supreme Court addressed this argument in *Bath Iron Works* by drawing a distinction between injuries such as asbestosis, which do not immediately result in disability, and hearing loss, where each assault causes some injury, even if not measurable. The injurious effect of the injury in hearing loss does not continue after the exposure. Similarly, the trauma which causes orthopedic injury ceases when the injurious exposure ceases, i.e., when claimant stops working. The Ninth Circuit was correct in addressing the selection of an arbitrary date prior to the last exposure.

> "[The test would] introduce new uncertainty into the process of determining liability under the last employer rule. The inquiry would not be a straight-forward one: In this case, it might be the date surgery was first recommended, the date that Price finally agreed to surgery, the date the papers were filed, the surgery was finally scheduled, or the date Price signed the consent form."

In contrast, utilization of the Supreme Court's rule that the employer who last causes disability, is responsible for the whole of the disability, reduces this uncertainty.

While the consideration of the physical and economic aspects of disability might, in some instances, be difficult, such difficulty is not a good reason to abdicate the Supreme Court's pronouncement of the appropriate test for determining liability. Instead, the determination as to the responsible employment should rest with the trier of fact. In this case, the Administrative Law Judge carefully considered the medical evidence, and the evidence of disability, before concluding that the last injury, and last disability, was caused by Metropolitan. The confirmation of the test articulated in *Bath Iron Works*, and renewed in *Rambo I* and *Rambo II*, would result in conformity among the circuits and, ultimately provide more clarity to employers as to which one would be responsible for compensation to injured workers, thus ensuring a timely delivery of benefits.

CONCLUSION

Disability under the Longshore Act is both a physical and economic concept. The elimination of either element in the definition of disability causes uncertainty and confusion. While the Ninth Circuit correctly affirms the findings of the trial court that the final disability and injury occurs at Metropolitan, the departure from the Supreme Court definition of disability, which includes both economic and physical aspects, cannot be upheld.

Respectfully submitted,

CHRISTOPHER M. GALICHON
LAW OFFICE OF
CHRISTOPHER M. GALICHON
1650 Hotel Circle No.,
Suite 120
San Diego, CA 92108
619-260-4950

Counsel for Respondents

Dated: May 11, 2004

(2)

No. 03-1457

Supreme Court, U.S.
FILED
MAR 2 0 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

CRESCENT WHARF & WAREHOUSE COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

GARY M. SPERO, ESQ.

STATE COMPENSATION INSURANCE FUND
U.S. L & H Legal South
1750 East Fourth Street,
Suite 140
Santa Ana, CA 92705-3909

Telephone: 714-480-6041
Fax: 714-565-5003

Counsel for Respondents State Compensation Insurance Fund, Pasha Maritime Services, Marine Terminals Corporation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT

In accordance with Rules 14.1 and 29.6 of this Court, State Compensation Insurance Fund, Pasha Maritime Services and Marine Terminals Corporation reports that they have no parent companies and no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT:	
(1) THE NINTH CIRCUIT HAS GIVEN US A BRIGHT LINE TEST TO DETERMINE LIABILITY IN MULTIPLE PARTY CUMULATIVE TRAUMA CASES	1
(2) THERE IS A POOL OF INSURANCE CARRIERS WHO ARE BETTER ABLE TO BEAR THE FINANCIAL BURDEN THAN THE INJURED WORKERS	3
(3) UNDER THE NINTH CIRCUIT'S BRIGHT LINE TEST IT WILL BE EASIER TO DETERMINE LIABILITY WITHOUT LITIGATION AND WILL PROMOTE SETTLEMENTS	4
CONCLUSION	5

TABLE OF AUTHORITIES

Page

CASES

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 2

STATUTES

Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-33 ..... 2, 3, 4, 5

INTRODUCTION

COMES NOW Respondents State Compensation Insurance Fund, (hereinafter referred to as 'SCIF') as carrier for Pasha Maritime Services and Marine Terminals Corporation and respectfully opposes the Petition for Writ of Certiorari filed by Petitioner. As no liability has ever been found by any adjudicator or reviewing court to rest with SCIF, Pasha Maritime Services or Marine Terminals Corporation, we would like to use this brief as a means of discussing the public policy issues inherent in this appeal rather than focusing on the purely legal discussions of the two major parties.

STATEMENT OF THE CASE

Petitioner Metropolitan Stevedore Company's procedural history of this matter as printed in their "Statement of the Case" in their Petition for a Writ of Certiorari at pages 3-6 is accurate and SCIF hereby adopts it as our own.

REASONS FOR DENYING THE WRIT

(1) The Ninth Circuit Has Given Us A Bright Line Test To Determine Liability In Multiple Party Cumulative Trauma Cases

The Ninth Circuit Court of Appeals in this matter has given us a bright line test to determine liability in multiple party cumulative trauma cases. This is done by defining the last responsible employer as the employer upon the date of the final physical injury, rather than the start of

diminished earning capacity. This is a far better test to determine liability as doctors will be able to state when the last bit of mechanical injury took place rather than a lengthy finger pointing fight between carriers as to the much harder to determine onset of economic harm. In the latter situation numerous factors need to be considered. Questions will be asked such as: When did the need for surgery arise? On what date did the decision to have surgery occur? When was it scheduled? Is the economic harm from the moment of the surgery or after rehabilitative therapy and recuperation? Each of these factors might occur under a different employer and carrier. No carrier will willingly step up to the plate to accept costly liability when there is a chance to roll it onto a prior or subsequent employer and carrier.

By defining liability by the last date of physical injury, years of litigation can be avoided. The questions will be: (1) For whom did the Claimant last work prior to having surgery or going off work? (2) Did even the slightest, microscopic physical harm occur medically during that work session?

If the answer to question number 2 is "yes" liability will be determined.

If the answer to question number 2 is "no" the parties will look at each preceding employer until the answer is "yes." Literally years of litigation will be avoided if the parties act in good faith. One would hope that the last responsible employer would then accept liability promptly and voluntarily and authorize the needed treatment and Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-33 (hereinafter "LHWCA") benefits, in keeping with the language quoted by Petitioner from the dissent in *Estate*

of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) (at pp. 485, 490-91).

If a dispute should still exist, the U.S. Department of Labor would be able to quickly make a recommendation at the Informal Conference level based on the medical reports and final work history to pinpoint liability. If the targeted carrier objects, the Office of Administrative Law Judges will be able to decide the issue with much less litigation than will be required under the tests proposed by Petitioner. It will all boil down to what the doctors say about when the last physical harm took place and the printout of work history for that day.

(2) There Is A Pool Of Insurance Carriers Who Are Better Able To Bear The Financial Burden Than The Injured Workers

The final result of applying the "last physical harm" test, as in this case, may seem very harsh for the targeted carrier and employer if the injured worker only was employed for a very short while when the last little bit of physical harm occurred. This though is a risk shared by all carriers who choose to participate in this market.

The pool of insurance carriers who write coverage for claims brought under the LHWCA are able to protect their business interests by determining sufficient premium to charge their insured employers to be able to bear these occasional financial hardships. Because there exists a pool of carriers, the carrier who gets tagged seemingly unfairly in one instance, will benefit in the next case where someone else is held liable. Ultimately it all works out.

Contrast this with the immense difficulty imposed on the injured worker who may be forced to go without medical treatment and benefits while multiple carriers point fingers at each other and endlessly litigate the last responsible employer determination over a course of many months or years. As a practitioner in this field for over a decade, the undersigned personally has seen cases where injured workers have lost their homes and suffered economic ruin and physical worsening while carriers fight with each other over liability. The carriers can far better shoulder the burden as a cost of doing business in the LHWCA insurance market.

(3) Under The Ninth Circuit's Bright Line Test It Will Be Easier To Determine Liability Without Litigation And Will Promote Settlements

It is critical in multiple party cumulative trauma cases that the parties are able to objectively look at the facts and determine where liability will ultimately fall. It is precisely this predictability that allows cases to be settled without lengthy litigation. This predictability of what will result should the matter be litigated will allow practitioners in this field to know when to "bite the bullet" and contribute heavily to a settlement even where the onset of harm may have occurred first with an earlier employer but where the ongoing harm and continuing need for treatment continues through the last day worked.

CONCLUSION

The fundamental purpose of the LHWCA is to promptly get treatment and benefits to the injured worker. The Ninth Circuit's bright line test in multiple party cumulative trauma cases will accomplish that goal with far less litigation than what is being proposed by the Petitioner. Therefore the undersigned requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

GARY M. SPERO, ESQ.
Counsel of Record for Respondents
State Compensation Insurance Fund,
Pasha Maritime Services,
Marine Terminals Corporation

(5)

Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

No. 03-1457

In the Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

CRESCENT WHARF AND WAREHOUSE CO., ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MICHAEL P. DOYLE
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, permits liability for a cumulative injury claim to be assigned to the last employer for whom the claimant worked prior to seeking treatment for the injury, where the claimant's compensable disability was fully determined prior to the date he worked for that employer.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bath Iron Works v. *Brown*, 194 F.3d 1 (1st Cir. 1999)	3
Bath Iron Works Corp. v. *Director, OWCP*, 506 U.S. 153 (1993)	2
Bath Iron Works Corp. v. *Director, OWCP*, 244 F.3d 222 (1st Cir. 2001)	11
Cordero v. *Triple A Mach. Shop*, 580 F.2d 1331 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979)	3, 8, 11
Delaware River Stevedores, Inc. v. *Director, OWCP*, 279 F.3d 233 (3d Cir. 2002)	11
Foundation Constructors, Inc. v. *Director, OWCP*, 950 F.2d 621 (9th Cir. 1991)	3
Kelaita v. *Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986)	3
Liberty Mut. Ins. Co. v. *Commercial Union Ins. Co.*, 978 F.2d 750 (1st Cir. 1992)	8, 11
Metropolitan Stevedore Co. v. *Rambo*:	
515 U.S. 291 (1995)	8, 10
521 U.S. 121 (1997)	7, 9, 10
New Haven Terminal Corp. v. *Lake*, 337 F.3d 261 (2d Cir. 2003)	11
Norfolk Shipbldg. & Drydock Corp. v. *Faulk*, 228 F.3d 378 (4th Cir. 2000), cert. denied, 531 U.S. 1112 (2001)	3

Cases—Continued: Page

Port of Portland v. *Director, OWCP*, 932 F.2d 836 (9th Cir. 1991) 9, 11
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 5
Stevedoring Servs. of Am. v. *Director, OWCP*, 297 F.3d 797 (9th Cir. 2002) 9
Stevens v. *Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991) 8
Travelers Ins. Co. v. *Cardillo*, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955) 3
Wisniewski v. *United States*, 353 U.S. 901 (1957) 12

Statutes, regulation and rule:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 1
§ 2(3), 33 U.S.C. 902(3) 2
§ 2(10), 33 U.S.C. 902(10) 2, 5, 7, 8, 9
§ 3, 33 U.S.C. 903 2
§ 4(a), 33 U.S.C. 904(a) 2
§ 4(b), 33 U.S.C. 904(b) 2
§ 8(b), 33 U.S.C. 908(b) 2, 10
§ 8(c), 33 U.S.C. 908(c) 2, 8
§ 8(c)(1)-(19), 33 U.S.C. 908(c)(1)-(19) 8
§ 8(c)(2), 33 U.S.C. 908(c)(2) 2, 5, 10
§ 8(c)(13), 33 U.S.C. 908(c)(13) 10
§ 8(c)(19), 33 U.S.C. 908(c)(19) 5
§ 8(c)(21), 33 U.S.C. 908(c)(21) 10
§10(d)(2), 33 U.S.C. 910(d)(2) 8
§ 39, 33 U.S.C. 939 2
20 C.F.R. 701.202(a) 2
Fed. R. App. P. 35(a)(1) 12

In the Supreme Court of the United States

No. 03-1457

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

CRESCENT WHARF AND WAREHOUSE CO., ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 339 F.3d 1102. The decisions of the Benefits Review Board (Pet. App. 10-22) and the administrative law judge (Pet. App. 23-72) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2003. A petition for rehearing was denied on January 26, 2004 (Pet. App. 73). The petition for a writ of certiorari was filed on April 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, pro-

vides compensation for work-related injuries that result in the disability or death of covered employees engaged in maritime work. 33 U.S.C. 902(3), 903. "Disability" is defined in relevant part as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The Act prescribes compensation according to the character and quality of the disability. Thus, for example, "[t]emporary total disability" is compensated during the period of disability at a rate of two-thirds of the claimant's average weekly wages. 33 U.S.C. 908(b). Certain "[p]ermanent partial" disabilities are compensated according to a statutory schedule that lists rates for the permanent loss or loss of use of various body parts or faculties. See, *e.g.*, 33 U.S.C. 908(c)(2) (loss of a leg is compensated at the rate of two-thirds of the claimant's average weekly wages for 288 weeks); see also *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 155-158 (1993) (describing compensation structure for permanent partial disability under the Act).

The LHWCA makes "[e]very employer" liable for compensation payable to its employees, "irrespective of fault as a cause for the injury." 33 U.S.C. 904(a) and (b). Where more than one employer exposed the employee to conditions that may have caused or contributed to the employee's injury or disease, the statute does not apportion liability among the employers. Instead, courts of appeals and the Director of the Office of Workers' Compensation Programs (OWCP), who administers the LHWCA for the Secretary of Labor, see 33 U.S.C. 939; 20 C.F.R. 701.202(a), have concluded that a "last employer rule" applies, under which full liability falls upon "the employer during the last employment in which the claimant was exposed to injurious stimuli,

prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment." *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir.), cert. denied, 350 U.S. 913 (1955); see, *e.g.*, *Norfolk Shipbldg. & Drydock Corp.* v. *Faulk*, 228 F.3d 378, 384 (4th Cir. 2000), cert. denied, 531 U.S. 1112 (2001); *Bath Iron Works* v. *Brown*, 194 F.3d 1, 6 (1st Cir. 1999); *Cordero* v. *Triple A Mach. Shop*, 580 F.2d 1331, 1337 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979).

The Ninth Circuit has taken the position that the last employer rule "is applied differently depending on whether a claimant's disability is characterized as an occupational disease or a two-injury case." *Kelaita* v. *Director, OWCP*, 799 F.2d 1308, 1311 (1986); see also Pet. App. 4-5; *Foundation Constructors, Inc.* v. *Director, OWCP*, 950 F.2d 621, 623-624 (1991). In the two-injury context, "[i]f the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible." *Id.* at 624. "If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible." *Ibid.*

2. Respondent William Price worked as an industrial mechanic and forklift driver for several maritime employers from the mid-1960s until the spring of 1995. Pet. App. 25, 29. Price experienced knee problems throughout this period. *Id.* at 25. On September 23, 1993, he was examined by an orthopedist, who concluded that Price needed total knee replacement surgery "when [he] is ready." *Id.* at 26. Price's most re-

cent employer prior to that examination was Crescent City Marine Ways, for which Price worked as a lift truck operator on September 16, 1993. *Ibid.*

Price received injections and other pain medications thereafter while continuing to work sporadically for various employers. Pet. App. 26-27. On December 16, 1994, Price visited an orthopedic surgeon and decided that he was ready to undergo knee replacement surgery for both knees. *Id.* at 27. Price's last employer prior to the December 16 medical visit was Crescent Wharf and Warehouse, which employed him as a lift truck operator on December 4, 1994. *Ibid.*

Price's knee replacement surgery was scheduled for April 24, 1995. Pet. App. 29. He continued to work sporadically before then, and his last work prior to undergoing surgery occurred on April 22, 1995, when petitioner Metropolitan Stevedore Company employed him as a forklift operator. *Ibid.* After the surgery, Price returned to work in November 1995 until his retirement in January 1997. *Id.* at 30-31.

3. Price filed a claim for disability benefits under the LHWCA against petitioner and several other maritime employers for whom he had worked before his surgery. Pet. App. 31. After conducting a trial, the administrative law judge (ALJ) determined, in accordance with applicable American Medical Association (AMA) guidelines, that Price lost 37% of the use of each leg as a result of his knee problems.[1] *Id.* at 65. Based upon this finding, the ALJ concluded that Price was entitled to

---

[1] The AMA guidelines assign a loss of use percentage to each of three possible outcomes for knee replacement surgery. If the outcome is "good," loss of use equals 37%; if the outcome is "fair," the loss equals 50%; and if the outcome is "poor," the loss equals 75%. Pet. App. 61.

permanent partial disability benefits for 106.56 weeks for each leg, pursuant to Section 8(c)(2) and (19) of the LHWCA, 33 U.S.C. 908(c)(2) and (19). Pet. App. 60, 65.[2] The ALJ also determined that Price was entitled to temporary total disability for the period between April 24, 1995, and November 5, 1995. *Id.* at 70.

Based upon Price's employment with petitioner on April 22, 1995, the ALJ determined that petitioner was the last responsible employer and was therefore liable for the disability award. Pet. App. 33-47. Under the Ninth Circuit's two-injury rule, the ALJ explained, petitioner was responsible for the award because Price's work on April 22 "did in fact cause some minor but permanent increase in the extent of his disability and increase the need for his knee surgery." *Id.* at 41; see also *id.* at 33-34, 36. The ALJ based this conclusion on the testimony of doctors who opined that Price's knee condition had continued to deteriorate up to the date of the surgery. *Id.* at 41-42. The ALJ acknowledged, however, that the record demonstrated that "any injury that might have occurred during the course of the claimant's April 22, 1995 employment did not cause his knee replacement surgery to occur any sooner, lengthen the post-surgery period of temporary disability, or increase the extent of the claimant's

---

[2] Section 8(c)(2) provides that permanent partial disability compensation for the loss of a full leg is payable, at two-thirds of the worker's pre-injury average weekly wage, for 288 weeks. 33 U.S.C. 908(c)(2). Under Section 8(c)(19), 33 U.S.C. 908(c)(19), when the injury "results in a partial loss of the use of a scheduled member * * * compensation is to be calculated as a proportionate loss of the use of that member." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 271 n.4 (1980). In this case, because Price lost 37% of the use of each leg, the ALJ multiplied 288 weeks by 37% to arrive at the 106.56 figure.

permanent disability." *Id.* at 43-44. The ALJ nonetheless determined that "this finding does not provide sufficient legal grounds for assigning last responsible employer liability to some other employer." *Id.* at 44.

Petitioner appealed to the Department of Labor's Benefits Review Board (BRB). Pet. App. 12. The BRB affirmed, finding the ALJ's decision to be "consistent with the applicable legal principles enunciated by the Ninth Circuit with respect to cumulative traumatic injury cases." *Id.* at 19. Petitioner then filed a petition for review of the BRB's decision with the Ninth Circuit. *Id.* at 2.

4. The court of appeals affirmed the BRB's decision. Pet. App. 1-9. After determining that the two-injury rule properly applied in this case, the court found that substantial evidence supported the ALJ's finding that Price's knee condition was aggravated by the work he performed for petitioner on April 22, 1995. *Id.* at 5-6. The court then framed the question as "whether that aggravation was of the 'disability,' as defined by the Act and interpreted by case law." *Id.* at 6.

The court concluded that it was, because Price's employment with petitioner "contributed to his injury." Pet. App. 8. In so ruling, the court rejected the contention that diminished earning capacity should be used as the "benchmark" to determine the point at which the disability occurs in two-injury cases. *Ibid.* ("It is unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two-injury cases."). The court acknowledged that, in applying the last responsible employer rule to occupational diseases, other circuits have treated "disability" solely as an economic concept. *Ibid.* The court distinguished those cases on the ground that, "[i]n occupational disease claims, it is necessary to define dis-

ability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression of the disease with particular points in time or specific work experiences." *Id.* at 7-8. In contrast, the court reasoned, cumulative injuries "are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times." *Id.* at 8. Treating "disability" as an economic concept, the court concluded, "would introduce new uncertainty into the process of determining liability under the last employer rule." *Ibid.*

ARGUMENT

The court of appeals erred by holding that "disability" is a function of physical rather than economic harm for the purpose of assigning liability among maritime employers who expose workers to cumulative injuries. Further review of the court of appeals' decision, however, is not warranted. The decision does not directly conflict with any decision of this Court or any other court of appeals.

1. Section 2(10) of the LHWCA defines "[d]isability" in relevant part as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). In light of this definition, this Court has stressed that "[t]he LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages." *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 126 (1997). "The Act speaks of this economic harm as 'disability,'" which is a "measure of earning capacity lost as a result of work-related injury." *Id.* at 126, 127; see also *id.* at 141 (O'Connor, J.,

dissenting) ("It is common ground that 'disability' under the LHWCA is an economic, rather than a medical, concept.").[3] The courts of appeals have adhered to this understanding in a variety of contexts, including application of the last employer rule. See, *e.g.*, *Liberty Mut. Ins. Co.* v. *Commercial Union Ins. Co.*, 978 F.2d 750, 759 (1st Cir. 1992) (holding in unscheduled injury case that the "date of disability, as determined by the date of decreased earning capacity, fixes liability as among successive insurers for LHWCA purposes"); *Stevens* v. *Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990) (with respect to distinction between total and partial disability, LHWCA's definition of disability "encompasses an economic, wage-earning aspect"), cert. denied, 498 U.S. 1073 (1991); *Cordero* v. *Triple A Mach. Shop*, 580 F.2d 1331, 1334 (9th Cir. 1978) (noting in unscheduled occupational disease context that "disability is an economic concept based upon a medical foundation"), cert. denied, 440 U.S. 911 (1979).

The court of appeals below deviated from this well-established understanding of "disability" and instead adopted a conception of "disability" that focuses exclusively on changes in the claimant's physical injuries. Pet. App. 6. That approach, the court reasoned, was justified in light of the increased "medical certainty" with which cumulative traumatic injuries "can be corre-

---

[3] In limited instances, disability under the Act is not directly related to lost earning capacity. The statute, for example, defines disability as "permanent impairment" in cases involving delayed manifestation occupational diseases that appear only after the worker has retired for other reasons. 33 U.S.C. 902(10), 910(d)(2). In addition, lost earning capacity is conclusively presumed with respect to claims that fall within the schedule of impairments set forth in Section 8(c) of the Act. See 33 U.S.C. 908(c)(1)-(19); *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 296 (1995).

lated more directly with identifiable work activities at particular times." *Id.* at 7-8. Adding consideration of diminished earning capacity in such cases, the court concluded, would be "unnecessary and undesirable." *Ibid.*

Even assuming *arguendo* that there is a legitimate reason for treating "two-injury" cases differently from occupational disease cases under the last employer rule, the court of appeals' justification for applying differing conceptions of "disability" is flawed.[4] In occupational disease claims, disability is defined in terms of loss of earning capacity not because of the difficulties in tracking the progression of the disease, but rather because the statute itself clearly equates "disability" with the incapacity to earn wages. 33 U.S.C. 902(10); *Rambo*, 521 U.S. at 126-127. Nothing in the statute's text, structure, or legislative history indicates that Congress intended a different, judge-made definition to govern cumulative trauma cases.

---

[4] The Director of the OWCP does not agree with the view that "two-injury" cases are properly scrutinized under a formulation of the last employer rule that differs from the rule applicable to occupational disease cases. In the Director's view, liability should fall in all cases on the last employer to have exposed the claimant to injurious stimuli before the compensable disability for which compensation is sought is shown to have existed. See *Stevedoring Servs. of Am.* v. *Director, OWCP (Benjamin)*, 297 F.3d 797, 802-803 (9th Cir. 2002); *Port of Portland* v. *Director, OWCP (Ronne)*, 932 F.2d 836, 840-841 (9th Cir. 1991). Where, however, an initial injury gives rise to a compensable disability and is later aggravated by a second injury that also creates a right to compensation, the first employer cannot escape liability under the last employer rule for compensation related to the initial injury. See *Benjamin*, 297 F.3d at 803 ("[N]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability.").

To the contrary, the LHWCA compensates disabilities stemming from cumulative injuries in the same way that it compensates disabilities caused by occupational diseases. For both, compensation is set according to a schedule of benefits, see, *e.g.*, 33 U.S.C. 908(c)(2) (permanent partial disability for loss of use of leg); 33 U.S.C. 908(c)(13) (permanent partial disability for occupational hearing loss), or upon proof of diminished wage earning capacity, see, *e.g.*, 33 U.S.C. 908(b) (temporary total disability); 33 U.S.C. 908(c)(21) (permanent partial disability measured by lost earning capacity with respect to non-scheduled losses).[5]

2. Notwithstanding the court of appeals' error, further review is not warranted in this case. The decision below does not directly conflict with any decision of this Court. Indeed, the last employer rule has never been the subject of this Court's attention. Thus, while the test for liability applied by the court below is in considerable tension with this Court's observation that "[d]isability is a measure of *earning capacity lost* as a result of work-related injury," *Rambo*, 521 U.S. at 127, this Court has not addressed the precise question at issue here.

Although numerous appellate decisions have addressed the last employer rule, moreover, no other court of appeals has considered whether "disability" is a function of physical rather than economic harm within

---

[5] It is true, of course, that a claimant seeking permanent partial disability for scheduled losses need not prove diminished earning capacity as an element of his claim. See *Rambo*, 515 U.S. at 296-297. Therefore, "disability" is not in all cases directly tied to wage earning capacity. But, contrary to the court of appeals' view, "disability" never encompasses a mere change in the worker's physical condition, such as the slight worsening of a knee condition like that suffered by Price during his one day of work for petitioner.

the specific context of two-injury cases.[6] To be sure, courts applying the last-employer rule in the context of latent occupational diseases have held that the responsible employer or insurer "is the one covering the risk at the last time the employee was exposed to harmful stimuli '*prior to the date the claimant became disabled*'" by virtue of "decreased earning capacity." *Bath Iron Works Corp.* v. *Director, OWCP*, 244 F.3d 222, 229 (1st Cir. 2001) (quoting *Liberty Mutual*, 978 F.2d at 759 (citing cases)). It is difficult to reconcile that rule with the approach followed by the court below, notwithstanding the panel's attempt to distinguish those precedents. See Pet. App. 7-8. But the occupational disease cases are not squarely on point, and the issue here is a novel one in this context. Absent some reason to believe that this issue is likely to recur frequently, there is no evident need for this Court's review.

In addition, the impact of the decision below on LHWCA enforcement is too uncertain to warrant review at this time. The decision is in obvious tension with Ninth Circuit precedent regarding the meaning of "disability" under the LHWCA, see, *e.g.*, *Cordero*, 580 F.2d at 1334, and with that circuit's precedent rejecting employer liability for a condition from which the worker already suffered its full compensable extent when he came to work for that employer, see *Ronne*, 932 F.2d at 840-841. Thus, it is conceivable that the court's ration-

---

[6] Although three other circuits have recognized the Ninth Circuit's formulation of the "two-injury" rule, none has addressed the question presented in this case. See *New Haven Terminal Corp.* v. *Lake*, 337 F.3d 261, 268 (2d Cir. 2003); *Delaware River Stevedores, Inc.* v. *Director, OWCP*, 279 F.3d 233, 241-242 (3d Cir. 2002); *Bath Iron Works Corp.* v. *Director, OWCP*, 244 F.3d 222, 228 (1st Cir. 2001).

ale in sustaining the award against petitioner may not survive reconsideration if a similar case arises within the Ninth Circuit. See Fed. R. App. P. 35(a)(1) (en banc consideration may be ordered when "necessary to secure or maintain uniformity of the court's decisions"); cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

HOWARD M. RADZELY
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
MICHAEL P. DOYLE
Attorney
Department of Labor

JULY 2004

No. 03-1457

Supreme Court, U.S.
FILED
SEP 15 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

CRESCENT WHARF & WAREHOUSE CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF FOR THE FEDERAL RESPONDENT

ROBERT E. BABCOCK
of counsel
WALLACE, KLOR & MANN, P.C.
5800 Meadows Road, Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY TO BRIEF FOR THE FEDERAL RESPONDENT

Although he acknowledges that the ruling below is wholly inconsistent with the statutory definition of "disability" endorsed by this Court in *Metropolitan Stevedore Company v. Rambo,* 521 U.S. 121 (1997) and the views of the agency charged with the administration of the Act,[1] the Solicitor General argues that review is not warranted "absent some reason to believe that this issue is likely to recur frequently." (Brief, page 11).

There is *every* reason to believe – indeed there is no doubt – that the issue improperly resolved by the Ninth Circuit will "recur frequently." First, the United States Department of Labor itself reports that 34 percent of all reported injuries involving lost time from work are caused by repetitive or cumulative trauma.[2] Second, this category

---

[1] Specifically, the Solicitor General joins with Petitioner in asserting that "liability should fall in all cases on the last employer . . . before the compensable disability for which compensation is sought is shown to have existed," agrees that the Ninth Circuit erred by holding "that 'disability' is a function of physical rather than economic harm for the purpose of assigning liability among maritime employers," and acknowledges that the Ninth Circuit's redefinition of "disability" is (i) wholly inconsistent with the statutory language and this Court's decision in *Metropolitan Stevedore Company v. Rambo,* 521 U.S. 121 (1997), (ii) "difficult to reconcile" with the approaches taken in other circuits, and (iii) in "obvious tension" with its internal precedent. (Brief, pages 7-8, 9 at fn. 4, 10, 11).

[2] See, United States Department of Labor, Bureau of Labor Statistics, "Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Days Away from Work, 2002," March 25, 2004. Although no Department of Labor agency maintains statistics documenting the percentage of current cases to which the Ninth Circuit's new rule is applicable, an informal survey of employers, insurers, claims administrators, and attorneys supports the Department's figures and indicates

(Continued on following page)

of injuries is fast expanding, increasing twenty-fold between 1972 and 2002.[3] Third, the Ninth Circuit's erroneous "cumulative trauma" rule will govern both the identification of the liable employer *and* the responsible insurance entity.

Within the maritime trades, it is extremely uncommon for a worker to spend his or her career with a single employer. It is equally rare for any individual employer to remain consistently self-insured or insured by the same carrier for extended periods. Coupled with the increasing number of cumulative trauma claims, these facts *guarantee* that the issue presented by this Petition will arise with increasing frequency.

Until the Ninth Circuit's error is corrected, those disputes will continue to be resolved by a rule that the Solicitor General and the agency charged with administrative responsibilities agree is inconsistent with the statutory language and this Court's decision in *Metropolitan Stevedore, supra,* "difficult to reconcile" with the approaches taken in other circuits, and in "obvious tension" with the Ninth Circuit's own precedent.

The Ninth Circuit's refusal to adhere to the statutory definition of "disability" is already generating results that cannot be reconciled with the Act's purposes. Examples of

---

that 30% to 35% of all currently pending West Coast claims involve responsibility disputes subject to the Ninth Circuit's new rule.

[3] *Ibid.* See, also, "Musculoskeletal Disorders (MSDs) and Workplace Factors: A Critical Review of Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Low Back," U.S. Department of Health and Human Services, Public Health Service Centers for Disease Control and Prevention, Institute for Occupational Safety and Health, Cincinnati, OH, July 1997.

what is being spawned by the decision below within the Ninth Circuit include decisions by Administrative Law Judges in *Zuvich v. Maersk Pacific, Ltd., et al.*, 2003-LHC-00454-48, November 25, 2003, *Colaruotolo v. Centennial Stevedoring, et al.*, 2002-LHC-0287-92, 2002-LHC-1393-95, December 13, 2002, and *Cranston v. Marine Terminals, et al.*, 2003-LHC-0214, July 29, 2004.[4]

In *Zuvich,* liability was determined by the worker's retaliatory selection of the site for his final microscopic injury. In *Colaruotolo*, resolution under the Ninth Circuit's purported "bright line" standard required reports and testimony from *nine* orthopedists and neurologists attempting to confirm or deny the presence of microscopic harm. In *Cranston,* identification of the employer responsible for the costs of necessary surgery has been indefinitely delayed because continued work activities prevent identification of the Ninth Circuit's "last employer."

In *each* of these cases, application of the standard for determining liability advanced by both the Department of Labor and Petitioner – application of the standard rooted in *Cardillo* and the statutory definition of "disability" – would have permitted prompt delivery of benefits to the injured worker, lessened the costs of litigation, *and* resulted in a different outcome.

The Solicitor General is simply wrong. There is *every* "reason to believe that this issue is likely to recur frequently" and, unless review is granted and the Ninth

---

[4] The decisions appear at www.oalj.gov/decisions/ALJ/LHC/2003/ZUVICH, 2002/COLARUOTOLO, and 2003/CRANSTON.

Circuit's error is corrected, every recurrence will result in a determination that cannot be squared with the legislative language or this Court's past decisions.

CONCLUSION

The Ninth Circuit clearly erred when it redefined "disability" and fashioned its unique rule for determining liability in cases involving cumulative trauma. Until that error is corrected, workers, employers, and insurance carriers within the Ninth Circuit with increasing frequency will continue to experience the types of problems typified by *Zuvich, Colaruotolo,* and *Cranston.*

Unnecessary and costly litigation will continue. Liability will be imposed even when there is no rational connection between work and the benefits awarded. For as long as continued employment and its inevitable further harm are permitted to provide immunity from liability, employers and insurers will have strong incentive to deny claims and delay the delivery of benefits.

The Solicitor's suggestion that "it is conceivable that [the ruling below] may not survive reconsideration" in a subsequent similar case stretches credulity. Within the Ninth Circuit, a decision of a panel becomes the "law of the circuit" and is binding on other panels until it is overruled by a subsequent *en banc* opinion or a superseding contrary decision of the Supreme Court. See, *Brand X Internet Servs. v. FCC,* 345 F.3d 1120, 1130 (9th Cir.

2004). The Ninth Circuit has already refused *en banc* review.

This Petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. BABCOCK
Counsel of Record for Petitioner
WALLACE, KLOR & MANN, P.C.
5800 Meadows Rd., Suite 220
Lake Oswego, Oregon 97035
(503) 224-8949

MOTION FILED
JUN 2 1 2004

(4)

No. 03-1457

IN THE

Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY
Petitioner,

v.

CRESCENT WHARF & WAREHOUSE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., IN SUPPORT OF PETITIONER

CHARLES THOMAS CARROLL, JR.*
F. EDWIN FROELICH
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 03-1457

METROPOLITAN STEVEDORE COMPANY

Petitioner,

v.

CRESCENT WHARF & WAREHOUSE COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37(b) of the Supreme Court of the United States, the National Association of Waterfront Employers ("NAWE") and Signal Mutual Indemnity Association, LTD. move for leave to file the brief *amicus curiae* in support of Petitioner for the reasons stated below. NAWE is a nationwide §501(c)(6) association of private sector marine terminal operators/stevedores whose member companies hire the longshore labor to load and unload vessels at the vast majority of general cargo and container terminals in the U.S. NAWE members comprise a substantial block of the employers covered by the Longshore and Harbor Workers'

Compensation Act ("LHWCA" or "Act"), and the longshore employees hired by NAWE members on a daily basis to handle the cargo likely comprise a majority of the employees covered by the Act on any given day.

Signal Mutual Indemnity Association, Ltd. is the largest group self-insurance facility authorized by the Secretary of Labor to secure compensation benefits for its 200 plus members.

NAWE members and Signal members take seriously their LHWCA financial obligations to provide for, and insure against, employee claims for work related injuries and illnesses, and therefore have a direct interest in seeking to have this Court fashion changes to the 'last employer' rule that will preclude its application by the Department of Labor in circumstances when the record contains substantial evidence indicating that the nominal last employer cannot fairly be held responsible for the claim.

To be sure, *amici* stress that they wish to preserve the 'last employer' rule in those circumstances where the evidentiary record properly supports the designation of a 'last employer' as the liable employer. Every NAWE member understands that, at one time or another, each 'will have its turn in the barrel' and be designated the 'last employer.'

Respectfully submitted,

CHARLES THOMAS CARROLL, JR.*
F. EDWIN FROELICH
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. THE *CARDILLO* LAST EMPLOYER RULE ("*CARDILLO* RULE") IS A RULE OF CONVENIENCE CREATED BY THE FEDERAL COURTS AS PART OF THE SUBSTANTIVE MARITIME LAW OF THE UNITED STATES, AND NOW NEEDS TO BE REVIEWED BY THE COURT.	2
II. THE PETITION SHOULD BE GRANTED SO THAT THE *CARDILLO* RULE CAN BE STRUCTURED TO CONFORM TO THE BODY OF EVIDENTIARY STANDARDS NOW APPLICABLE TO ADJUDICATIONS BEFORE FEDERAL AGENCIES AND COURTS.	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES — Page

Director, OWCP v. Greenwich Collieries, 512 U.S. 267 1994) 2, 5

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 3

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 3

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 3

Travelers Ins. Co. v. Cardillo, 225 F2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955) ... *passim*

Washington v. Dawson, 264 U.S. 219 (1924) 3

STATUTES

Administrative Procedure Act, 5 U.S.C. § 556(d) 2, 5

Longshore and Harbor Workers' Compensation Act, 33 U.S. C. § 901 *et seq.* ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, § 2, cl.1 2

IN THE

Supreme Court of the United States

No. 03-1457

METROPOLITAN STEVEDORE COMPANY
Petitioner,

v.

CRESCENT WHARF & WAREHOUSE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The interests of *amicus curiae* in this matter are detailed in the accompanying Motion for Leave to File the Brief *Amicus*

[1] Pursuant to Rule 37.6, counsel states that they authored this brief in its entirety, and that no party has made a financial contribution to the brief other than members of *amicus* through their annual dues assessment. Pursuant to Rule 37(2)(b), counsel for Petitioner, the Federal Respondent, and Respondent Crescent Wharf have granted consent to file this brief. Their letters have been filed with the clerk of the court. Counsel for the other respondents have not granted consent.

Curiae in Support of Petitioners, and in the interest of reducing the burden on the Court, will not be restated here but should be incorporated herein.

SUMMARY OF ARGUMENT

Amicus submits that the decision of the circuit court deserves review because the 'last employer' rule, a substantive rule of maritime law, is too often applied in a fashion that produces administrative convenience instead of fundamental fairness. *Amicus* believes the rule can be structured by the Court to produce a rule which is fair to all covered employers involved in the employment chain. Thus the decision below should be reviewed to conform the rule to the fundamental compensation concepts found in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*("LHWCA" or "Act"), the evidentiary requirements of the Administrative Procedure Act, 5 U.S.C. § 556, and this Court's controlling opinion in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267(1994).

For these reasons, *amicus* submits that the Petition for Certiorari should be granted.

ARGUMENT

I. THE *CARDILLO* LAST EMPLOYER RULE ("*CARDILLO* RULE") IS A RULE OF CONVENIENCE CREATED BY THE FEDERAL COURTS AS PART OF THE SUBSTANTIVE MARITIME LAW OF THE UNITED STATES, AND NOW NEEDS TO BE REVIEWED BY THE COURT.

The power to regulate admiralty and maritime matters flows from the Constitution of the United States to the federal judiciary. Article III, § 2, cl.1. Unlike other areas of federal law, where the role of the federal courts is limited to interpretation, in the area of admiralty and maritime law, the

federal courts have a far greater role. The Constitution grants the federal courts the power to interpret admiralty and maritime law, but also grants to the federal courts the power to develop on their own new substantive admiralty and maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). The Court has noted that its power to regulate maritime law is shared with the Congress. *Washington v. Dawson*, 264 U.S. 219 (1924).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA" or "Act"), is a product of this Constitutional structure. The LHWCA was enacted following this Court's holdings that states are preempted from regulating maritime commerce. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and that the authority to regulate maritime law is non-delegable to the states, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Therefore, states are constitutionally barred from applying state workers' compensation laws to maritime employees. In response to this constitutional bar, Congress enacted a federal workers' compensation statute to cover designated maritime employees—the LHWCA.

Not only is the LHWCA a product of this constitutional structure, but the rule of law at issue in this petition—the so called *Cardillo* Rule—also hails from this structure even though it has no textual basis in the LHWCA. Instead, this substantive rule of law was created some 50 years ago by the Second Circuit. *Travelers Ins. Co. v. Cardillo*, 225 F2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). While it has since been adopted by a number of other circuits, it has never been reviewed by this Court. With its application to the facts below, however, the *Cardillo* Rule has now evolved from its original purpose as a useful rule of convenience to become an absolute rule imposing liability regardless of the underlying facts. Essentially, it has become the 'last employer, period' rule.

Amicus urges the Court to take this opportunity to ratify the *Cardillo* Rule as part of the substantive admiralty and maritime law of the United States, while clarifying the contours of the rule to preclude its routine application as a rule of convenience to any employer designated the 'last employer'—regardless of the state of the evidence indicating that work related injury during a period of prior employment may be more reasonably pointed to as responsible for the underlying injury and claim.

II. THE PETITION SHOULD BE GRANTED SO THAT THE *CARDILLO* RULE CAN BE STRUCTURED TO CONFORM TO THE BODY OF EVIDENTIARY STANDARDS NOW APPLICABLE TO ADJUDICATIONS BEFORE FEDERAL AGENCIES AND COURTS.

The fundamental policy underlying the LHWCA is that each covered employer is solely liable for work related injuries to his employees, and is to take steps to ensure payment of benefits when necessary. With the notable court made exception set out in *Cardillo*, the Act absolves other employers in the chain of employment from liability. As an initial matter, *amicus* stresses that the employers it represents normally have no quarrel with the application of the *Cardillo* Rule, or its rational as set forth by the *Cardillo* court. Indeed these employers long ago concluded that the *Cardillo* Rule is ordinarily a fair extra statutory device to assign liability—in lieu of apportionment—in claims involving several successive employers when the timeliness of causation cannot be pinned down with sufficient evidentiary certainty. Simply put, in this circumstance, when, as the last employer, 'it is your turn in the barrel,' you are tagged with the liability for the claim.

The same cannot be said, however, when applying the *Cardillo* Rule to certain claims—such as that below—which produce substantial, reliable, and relevant evidence to prove that work performed by a claimant during his tenure with the nominal last employer simply could not have been a factor in the underlying claim. *Amicus* suggests that the circuit court's blind application of the *Cardillo* Rule, ignoring the state of the reliable evidence found in the record, deprives the Petitioner, as well as every other employer yet to be cast as the last employer in similar circumstances, of its statutory right to rebut causation by producing substantial evidence to the contrary, as expressly allowed for by § 20(a) of the LHWCA, 33 U.S.C. § 920(a), and § 7(c) of the APA, 5 U.S.C. § 556(d). The circuit court's cold application of the *Cardillo* Rule in this circumstance effectively creates an irrebutable presumption and flies in the face of the Court's underlying rationale in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Amicus submits that the Court should not allow the *Cardillo* rule to become just another blindly applied rule of convenience, and asks the Court to use its constitutional maritime authority to refashion the rule in a way that takes into account all of the relevant facts placed into the record that may point to employment periods with another employer as more fairly responsible for the injury.

Thus, in order to cure the short-sighted application of the *Cardillo* Rule to claims such as that below, *amicus* suggests that the Petition for Certiorari be granted so that the *Cardillo* Rule can be structured to align it with the basic evidentiary policies of the underlying statutes, and this Court's all important APA jurisprudence.

CONCLUSION

For the aforementioned reasons *amicus* respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

CHARLES THOMAS CARROLL, JR.*
F. EDWIN FROELICH
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Counsel for Amicus Curiae